Supreme Court, U.S.
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No. _____ OFFICE OF THE

In The

Supreme Court of the United States

October Term, 1997

WYOMING DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

BEVERLY A. STRAIGHT,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Section 106(b) of the Bankruptcy Code provides that a "governmental unit" that files a claim in a case waives sovereign immunity for claims against it that "arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." The Wyoming Department of Employment filed claims in this bankruptcy case for payroll liabilities. In the same case, the bankruptcy court ordered the Wyoming Department of Transportation to pay monetary sanctions for violating the automatic stay by revoking one of debtor's business certificates. The Tenth Circuit affirmed, finding that the Department of Employment's claims waived the Department of Transportation's Eleventh Amendment immunity. The questions are:

1. Does Section 106(b) clearly and unequivocally provide that the filing of a claim by one state agency waives the state's immunity with respect to a debtor's claim against a separate state agency?

2. Where the only connection declared between the Department of Employment's claims and the debtor's claims against the Department of Transportation is that they all "arose out of . . . the Debtor's business," is this sufficient to satisfy the Section 106(b) "same transaction or occurrence" standard?

3. Does Section 106(b) violate the Eleventh Amendment by conditioning a state's filing of a claim in a bankruptcy case on a waiver of its immunity, not just for ajudication of the claim, but also to allow a debtor affirmative relief against the state?

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PETITION FOR WRIT OF CERTIORARI

The Wyoming Department of Transportation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App. 1-13) is reported at 143 F.3d 1387. The opinion of the United States District Court for the District of Wyoming (App. 14-59) is reported at 209 B.R. 540. The relevant orders of the Bankruptcy Court for the District of Wyoming (App. 60; 61-66) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 9, 1998 (App. 1-13). An order denying rehearing en banc was entered on July 23, 1998 (App. 67). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Notifications required by Sup. Ct. R. 29.4 have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in

law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

11 U.S.C. § 106(b) (1997) provides:

> A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

11 U.S.C. § 101(27) (1997) provides:

> "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

STATEMENT UNDER RULE 29.4(b)

Because the proceeding draws into question the constitutionality of 11 U.S.C. § 106(b), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

No Court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the

Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court held that Congress may not use its powers under Article I of the United States Constitution to abrogate state Eleventh Amendment immunity. This is one of many cases to consider Eleventh Amendment immunity under the Bankruptcy Code in the wake of *Seminole Tribe*.[1]

This case arose out of the Chapter 13 bankruptcy petition filed on January 13, 1995, by Beverly A. Straight (Respondent). (Rec. 4)[2] The Tenth Circuit based its decision below on the relationship between actions taken by the Wyoming Department of Employment and the Wyoming Department of Transportation in this bankruptcy case. The actions of each entity will therefore be set forth below, followed by a discussion of the disposition below.

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[1] *See, e.g., In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237 (3rd Cir. 1998); *Matter of Fernandez*, 123 F.3d 241 (5th Cir. 1997); *In re Light*, 87 F.3d 1320 (9th Cir. 1996); *In re Rose*, 215 B.R. 755 (Bankr.W.D.Mo. 1997); *In re Louis*, 213 B.R. 796 (Bankr.D.Conn. 1997). *See also* Joseph F. Riga, *State Immunity in Bankruptcy After Seminole Tribe v. Florida*, 28 Seton Hall L. Rev. 29 (1997); Patricia L. Barsalou, *Defining the Limits of Federal Court Jurisdiction over States in Bankruptcy Court*, 28 St. Mary's L.J. 575 (1997).

[2] The abbreviation Rec. will be used to cite to the record below which is a single volume appendix.

1. Actions of the Wyoming Department of Employment

On February 27, 1995, the Wyoming Department of Employment, Employment Resources Division, filed a claim in Respondent's bankruptcy case for unpaid unemployment taxes. The claim alleged unpaid unemployment taxes and interest owing for April, 1993; January, 1994; and March, 1994. The total amount claimed for these periods was $2,474.88. (Rec. 151-152)

On March 24, 1995, the Wyoming Department of Employment, Workers' Safety and Compensation Division, filed a claim for unpaid workers' compensation premiums plus interest and claims reimbursement charges. This claim alleged $27,597.42 owing for August 1, 1994 through January 13, 1995. (Rec. 153)

2. Actions of the Wyoming Department of Transportation

When Respondent filed her bankruptcy petition, she was a highway flagging contractor, certified by the State of Wyoming as a "Disadvantaged Business Enterprise" (DBE). (Rec. 154) The DBE certification is not the equivalent of a business permit. When the Department of Transportation receives certain federal dollars, it is required to implement a DBE program, whereby a percentage of the dollar amount of federally funded work is performed by qualified DBE contractors. General contractors are thus required on certain federally funded projects to use or give a preference to DBE certified subcontractors if available. *See* 49 C.F.R. § 23.61 (1997).

On February 10, 1995, the Department of Transportation sent Respondent notice of its intent to revoke Respondent's DBE certification, which provided in part:

> 49 CFR 23.45(f)3(iv) require[s] Wyoming Department of Transportation to "analyze the bonding and financial capacity of the firm" for eligibility in the DBE program. DBE Definition 1.A(b) states a "disadvantaged business" means a small business concern is one "whose management and daily business operation are controlled by one or more of the socially and economically disadvantaged individuals who own it."
>
> It is apparent that you have lost the ability to control the financial capacity of this firm. By filing for Chapter 13 bankruptcy, you have lost the ability to control your business; that control now lies in the hands of the Bankruptcy Court and the Bankruptcy Trustee.

(Rec. 164)

On March 28, 1995, the Department of Transportation revoked Respondent's DBE certification, and approximately four months later, on July 25, 1995, Respondent moved the Bankruptcy Court for an order to show cause and a contempt citation.[3] (Rec. 154; 169)

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[3] The Department of Transportation's actions are also the subject of an adversary proceeding in bankruptcy court. On July 26, 1996, Respondent filed a complaint in bankruptcy court against the Department of Transportation alleging damages caused by the Department's revocation of Respondent's DBE certification. The complaint alleges that the Department's action cost Respondent a number of contracts and that these contracts

3. Disposition Below

On September 20, 1995, the Bankruptcy Court issued an order finding that the Department of Transportation had violated the automatic stay and anti-discrimination provisions of the Bankruptcy Code. (App. 61, 65) The Bankruptcy Court ordered the Department of Transportation to reissue Respondent's DBE certificate and entered monetary sanctions against the Department in the form of attorney fees and costs. (App. 66)

The Department of Transportation sought reconsideration of but did not appeal the order finding the violation of the automatic stay and entering monetary sanctions. It did appeal the Bankruptcy Court's July 11, 1996 order setting the amount of the monetary sanctions.[4] (Rec. 148) On May 15, 1997, the District Court issued an order affirming the entry of monetary sanctions. (App. 14) The District Court concluded first that Congress had, pursuant to a valid exercise of its powers under the Fourteenth Amendment, abrogated state Eleventh Amendment immunity by its enactment of Section 106(a) and the Eleventh Amendment was therefore not a bar to the entry of sanctions against the Department of Transportation. (App. 52) The District Court also found, in the alternative, that the claims filed by the Department of

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would have netted Respondent approximately $250,000.00 in profits. (Rec. 178) The Bankruptcy Court stayed the adversary proceeding pending decision by the Tenth Circuit. A status conference for the adversary proceeding has been scheduled for September 24, 1998.

[4] The District Court had jurisdiction over the appeal pursuant to 28 U.S.C. § 158 and 28 U.S.C. § 1334.

Employment waived the Department of Transportation's Eleventh Amendment immunity under Section 106(b). (App. 52)

The Department of Transportation appealed the District Court's decision to the Tenth Circuit, and on June 9, 1998, the Tenth Circuit issued its decision upholding the order entered against the Department of Transportation. (App. 1) The Tenth Circuit declined to address the constitutionality of Section 106(a) of the Bankruptcy Code and instead affirmed solely on the ground that the State of Wyoming had waived its Eleventh Amendment immunity. (App. 5)

The Tenth Circuit rejected the Department of Transportation's argument that the term "governmental unit," as defined in Section 101(27) of the Bankruptcy Code, means the state *or* one of its agencies, but not necessarily both at the same time. (App. 7) The Tenth Circuit concluded that the term "governmental unit," as used in Section 106(b) of the Bankruptcy Code, means the state *and* its agencies, and therefore one state agency can waive the immunity of other state agencies or of the entire state. (App. 8) The Tenth Circuit based this conclusion on its prior ruling that the United States and its separate agencies are to be treated as a unified creditor under the Bankruptcy Code and upon Wyoming statutes and case law defining "state" and "state agency" to mean the same thing. (App. 8)

After concluding that one agency can waive the immunity of a separate agency, the Tenth Circuit addressed whether the Department of Employment's claims for unpaid workers' compensation premiums and

unemployment taxes arose out of the same transaction or occurrence as debtor's claim against the Department of Transportation for its violation of the automatic stay as required by Section 106(b). (App. 11) The Tenth Circuit found that the Department of Transportation's ground for revoking Respondent's DBE certificate was directly related to the operation of Respondent's business and that the Department of Employment's claims also arose out of the operation of Respondent's business. (App. 11) From this, the Court reasoned that the Department of Employment's claims and Respondent's claim against the Department of Transportation arose out of the same transaction or occurrence – namely, Respondent's business. (App. 11)

Lastly, after finding that, under Section 106(b), the Department of Employment's filing of claims waived the Department of Transportation's Eleventh Amendment immunity, the Tenth Circuit addressed the constitutionality of Section 106(b). The Tenth Circuit concluded that the Section 106(b) waiver is constitutional, acknowledging that the Fourth Circuit had reached the opposite conclusion. (App. 11) The Tenth Circuit held that Congress can deem state immunity waived by certain state action and that such a deemed waiver is distinguishable from an abrogation of immunity. The court reasoned:

> But § 106(b) does not pretend to **abrogate** a state's immunity, it merely codifies an existing equitable circumstance under which a state can choose to preserve its immunity by not participating in a bankruptcy proceeding or to partially waive that immunity by filing a claim. The choice is left to the state. Thus, § 106(b) follows

the lead already established by the Supreme Court in *Gardner v. New Jersey*.

(App. 12)

REASONS FOR GRANTING THE PETITION

Each year, state agencies file claims against thousands of debtors who have sought protection under the Bankruptcy Code. Often, the debtor seeks to assert a counterclaim against that state agency or against another arm of the state. This case addresses a clash between debtors' efforts to assert such counterclaims in federal bankruptcy courts and the states' Eleventh Amendment immunity. Congress has spoken to the issue by enacting Section 106(b) – a broad waiver rule. At issue in this case are two statutory construction issues that will determine how broad the provision truly is and a constitutional issue that will determine whether Congress' "waiver" rule is an unconstitutional end run around the dictates of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

Section 106(b) provides that a "governmental unit" that has filed a claim in a case waives sovereign immunity for claims against it that "arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." On its face, the provision contains two important limitations – the waiver only applies to "*such* governmental unit" and to claims that "arose out of the *same* transaction or occurrence." The Tenth Circuit broadly interpreted both limitations, giving expansive scope to a provision that expressly seeks to limit state Eleventh Amendment immunity.

The Tenth Circuit did not stop there; it went on to uphold the constitutionality of Section 106(b), holding that this Court had already resolved the issue in *Gardner v. New Jersey*, 329 U.S. 565 (1947). The Tenth Circuit's decision, both as to the scope of the Section 106(b) waiver and its constitutionality, is in conflict with other circuits. This Court has not, in fact, resolved the constitutional issue. This case would be an opportune time to do so.

I. The Tenth Circuit Has Decided Important Questions of Federal Law In a Way That Conflicts With Relevant Decisions of This Court, and In Doing So, It Has Left an Unprecedented Gap in Eleventh Amendment Immunity.

A. The Tenth Circuit's Broad Interpretation of the Term "Governmental Unit" Conflicts With This Court's Holdings in *Atascadero*, *Hoffman* and *Nordic*.

Under Section 106(b), the immunity deemed waived by the filing of a claim is the immunity of the "governmental unit" that filed the claim. Thus, the definition given the term "governmental unit" will dictate, in part, the scope of the waiver. That definition, contained in Section 101(27), does not specify whether two separate agencies constitute the same "governmental unit." Under this Court's precedents, there can be no waiver in an ambiguous text. The Tenth Circuit ignored those precedents and concluded otherwise.

A state's waiver of Eleventh Amendment immunity is its *consent* to suit in federal court, and this Court has held that this consent must be authorized, knowing and voluntary. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Ford*

Motor Co. v. Treasury Dep't, 323 U.S. 459, 467 (1945). In *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), this Court expressed the great caution with which it will find a textual waiver or abrogation of immunity and its reasons for that caution:

> Only recently the Court reiterated that "the States occupy a special and specific position in our constitutional system. . . . " The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance. "Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system."
>
> Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain. * * * In view of this fact, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.

Atascadero, 473 U.S. at 242-43 (internal citations omitted).

From its reluctance to find waivers, stems this Court's rules for interpreting textual waivers of immunity. This Court has announced a strict rule of construction that

> a state will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.

Atascadero, 473 U.S. at 238-40 (internal quotations and citations omitted).

This Court has also insisted that the unequivocal expression of waiver be contained in the language of the statute creating the waiver – sources outside the language of the statute, such as policy or legislative history, may not be consulted to support a finding of waiver. *Hoffman v. Conn. Dep't of Income Maintenance*, 492 U.S. 96, 104 (1989); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992).

In *Nordic*, this Court used these same rules of statutory construction in considering whether a former provision of the Bankruptcy Code created a valid waiver of immunity. *Nordic*, 503 U.S. at 33-34. The Court found that the provision in question could have more than one plausible reading, with at least two readings supporting a finding of no waiver, and the provision therefore did not use the requisite clear and unequivocal language to create a waiver of immunity:

> The foregoing are assuredly not the only readings of subsection (c), but they are plausible

> ones – which is enough to establish that a reading imposing monetary liability on the Government is not "unambiguous" and therefore should not be adopted.

Nordic, 503 U.S. at 37.

The Tenth Circuit's decision, however, ignored these cautionary principles. Instead, it simply chose to adopt what it viewed as the "correct" meaning of the term "governmental unit," without considering the alternative plausible interpretation. In doing so, it decided the case in a manner wholly inconsistent with this Court's rules of interpretation set forth in *Atascadero*, *Hoffman* and *Nordic*.

The lower courts are deeply divided on the meaning to be given the term "governmental unit." Some courts have concluded, like the Tenth Circuit, that the term means the state *and* its agencies, and therefore a state will always be treated as a unitary creditor.[5] Others have adopted the definition urged by the Department of Transportation, that the term means the state *or* one of its agencies, and therefore the filing of a claim waives only the immunity of the particular agency that filed the claim.[6]

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[5] *See In re Lazar*, 200 B.R. 358, 379 (Bankr.C.D.Cal. 1996); *In re Charter Oak Assoc.*, 203 B.R. 17, 22 (Bankr.D.Conn. 1996); *In re Bison Heating & Equip., Inc.*, 177 B.R. 785, 789-90 (Bankr. W.D.N.Y. 1995); *In re Gibson*, 176 B.R. 910 (Bankr.D.Or. 1994).

[6] *See In re Leeth Constr., Inc.*, 170 B.R. 684, 688 (Bankr.D.Ariz. 1994); *In re William Ross, Inc.*, 199 B.R. 551, 555 (Bankr.W.D.Pa. 1996); *In re Four Seasons Care Ctrs.*, 119 B.R. 681, 683-84 (Bankr.D.Minn. 1990); *In re R & W Enter.*, 181 B.R. 624, 639 (Bankr.N.D.Fla. 1994); *In re Rocchio and Sons, Inc.*, 165 B.R. 86 (Bankr.D.R.I. 1994).

The interpretation of the Section 101(27) definition of "governmental unit" offered by the Department of Transportation is a plausible interpretation, as supported by the numerous decisions adopting the more limited definition. In this regard, the use of the term "or" in Section 101(27) suggests the term "governmental unit" may not necessarily mean the State and all of its subsidiary entities at the same time. Furthermore, as the Tenth Circuit pointed out, the term "state" usually means the state and all its parts, and Congress could therefore have just used the term "state" if it in fact intended "governmental unit" to always mean the state *and* its departments, agencies and instrumentalities.

The purpose of suggesting these different interpretations of 101(27) is not to establish that one or the other is the "correct" interpretation, but to show that the provision can have at least two plausible readings. This necessarily means, as this Court explained in *Nordic*, that the provision is ambiguous, and because it is ambiguous, it cannot be construed against the state to effect the broadest possible waiver. Yet that is exactly what the Tenth Circuit did.

Furthermore, the Tenth Circuit looked outside the text of Section 101(27) to find the broad definition of "governmental unit," relying upon Wyoming statutes and case law. This offends the *Nordic* and *Hoffman* rule that the unequivocal expression of the waiver must be found in the statutory text. It is irrelevant how the state views itself under state law; the only relevant inquiry is what conditions the federal law imposes on the filing of a claim and whether the conditions are clearly and unequivocally expressed.

The Tenth Circuit's definition of "governmental unit" also ignores the requirement that a waiver of immunity must be knowing and authorized. *See Ford*, 323 U.S. at 467. Wyo. Stat. § 1-35-107 (1997)[7] authorizes a Wyoming agency to submit to a court's jurisdiction for resolution of that agency's claim, but it does not by any means authorize one state agency to waive the immunity of another state agency or of the state as a whole. Furthermore, when one agency's action is deemed a waiver of another agency's immunity, it is highly unlikely that the waiver is a knowing waiver. A state employee in one agency is unlikely to know of possible counterclaims a debtor may have against a separate state agency and to consciously risk exposure to them.

In contrast to this Court's waiver analysis, the Tenth Circuit was not at all reluctant to find a broad textual waiver in Section 106(b). Its decision below has left a gaping hole in state Eleventh Amendment immunity, allowing future waivers to be very easily found. An agency's filing of a claim in a bankruptcy court, under the Tenth Circuit's jurisdiction, will now effect the broadest possible waiver, without regard to whether the waiver is knowing or authorized.

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[7] Wyo. Stat. § 1-35-107 provides, in part:

> The state of Wyoming or any department or instrumentality thereof, * * * is authorized to bring an action in any court having jurisdiction to recover any money due it upon any contract or other liability or obligation.

B. The Tenth Circuit's Broad Interpretation of the Section 106(b) "Same Transaction or Occurrence" Test Conflicts With This Court's Decisions in *Atascadero*, *Hoffman* and *Nordic*.

The interpretation given the Section 106(b) "same transaction or occurrence" standard, like the definition of "governmental unit," dictates the scope of the waiver effected by a state agency filing a claim in a bankruptcy case. The Tenth Circuit gave this language a liberal construction that again results in the type of broad waiver this Court has many times cautioned against.

The Section 106(b) "same transaction or occurrence" standard requires, as Congress intended, a Fed. R. Civ. P. 13(a) compulsory counterclaim analysis. *Aer-Aerotron, Inc. v. Texas Dep't of Transp.*, 104 F.3d 677, 679 (4th Cir. 1997); *In re Price*, 42 F.3d 1068, 1072-72 (7th Cir. 1994); *WJM, Inc. v. Mass. Dep't of Pub. Welfare*, 840 F.2d 996, 1005 (1st Cir. 1988).

A counterclaim is compulsory within the meaning of Rule 13(a) if:

> (1) the issues of fact and law raised by the principal claim and the counterclaim are largely the same; (2) res judicata would bar a subsequent suit on the defendant's claim; (3) the same evidence supports or refutes the principal claim and the counterclaim; and (4) there is a logical relationship between the claim and counterclaim.

Driver Music v. Commercial Union Ins., 94 F.3d 1428, 1435 (10th Cir. 1996).

The unwarranted breadth of the waiver announced by the Tenth Circuit is illustrated by application of the Rule 13(a) test. Not one of the Fed. R. Civ. P. 13(a) elements is satisfied by the tenuous connection identified by the Tenth Circuit – that connection being that the claims all arose out of Respondent's business. In fact, the claims arose out of different facts, concern different laws and will require different evidence.

The Department of Employment's claims arose months, and even years, before Respondent's claim against the Department of Transportation arose, and the claims are based on Wyoming statutes governing unemployment insurance and workers' compensation. Respondent's claim on the other hand is based on the Bankruptcy Code's automatic stay provision.

To prove its claims, the Department of Employment must prove, for the time periods in question, that Respondent was operating a business, that she employed a certain number of employees, and that she failed to make the statutorily required payments. To prove her claim against the Department of Transportation, Respondent must prove that she filed a bankruptcy petition, that the automatic stay was in effect and that the Department of Transportation took an action that violated the stay. Quite plainly, there will be little, if any, overlap in witnesses, evidence or legal theories.

Lastly, the test's res judicata element is clearly not satisfied. Resolution of either claim would not resolve the other. In fact, if these claims were mandatory counterclaims, this would mean the facts underlying the Department of Employment's claims *must* be litigated at the

same time as the Respondent's claim against the Department of Transportation. Yet, no one has ever suggested that adjudication of an automatic stay case will preclude a state from later having its claim allowed, in the usual claims adjudication process.

In its decision below, the Tenth Circuit has announced a waiver standard that purports to be many things that it clearly is not. The standard is not the Section 106(b) standard, and, as will be seen below, it does not adhere to this Court's waiver standards, in particular its holding in *Gardner*. The result is a broad and confusing standard that makes it nearly impossible for a state to *knowingly* waive its immunity. This confusion is exacerbated by the Tenth Circuit's own inconsistent waiver precedent. *See United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 933 (10th Cir. 1996) (addressing immunity of federal government and holding that court's authority to allow or disallow government's claims is distinct from its authority to enforce the automatic stay against the government); *Haldeman v. Wyo. Farm Loan Bd.*, 32 F.3d 469 (10th Cir. 1994) (holding that when the Wyoming Farm Loan Board filed a claim in debtor farmer's bankruptcy case for sums owing on a loan, it did not waive its Eleventh Amendment immunity from debtor's claim arising out of the Board's foreclosure on that same loan); *In re Graham*, 981 F.2d 1135 (10th Cir. 1992) (holding that Court could not impose an attorneys' fees sanction on the government with respect to alleged bad-faith positions it took in litigating the precise claim it was asserting against the debtor, because those sanctions did not arise out of the same transaction as the underlying claim).

Despite this broad and confusing waiver standard that will undoubtedly impair a state agency's ability to make a knowing and voluntary waiver of immunity, the Tenth Circuit has expressed its inclination to find a waiver and to broadly interpret that waiver. This is an unacceptable affront to state Eleventh Amendment immunity, a principle this Court has declared vital to the constitutionally mandated balance of power between the states and the federal government.

II. The Tenth Circuit Conclusion That Section 106(b) is Constitutional is not Compelled by This Court and Conflicts with Decisions by Other Circuits.

In its decision below, the Tenth Circuit held that the Section 106(b) waiver follows the lead of this Court in *Gardner* and is merely a codification of this Court's prior pronouncements on waiver. (App. 12) However, the test announced by the Tenth Circuit results in a waiver that is much broader than this Court has ever found from the filing of a claim in a bankrupctcy case.

A. This Court's Decision in *Gardner* did not Sanction Affirmative Counterclaims Against a State.

In *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947), this Court addressed the waiver of immunity effected by a state's filing of a claim in a bankruptcy case. In *Gardner*, the Central Railroad Company of New Jersey filed a bankruptcy petition for reorganization of its debts, and the state of New Jersey filed a claim in the bankruptcy case for unpaid taxes. The bankruptcy trustee and the debtor objected to the amounts of the claims and the

trustee petitioned the bankruptcy court to adjudicate the tax claims. The bankruptcy court allowed certain defenses to be asserted over New Jersey's objections, and New Jersey appealed. This Court upheld the bankruptcy court's authority to adjudicate the claim, reasoning as follows:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. ***No judgment is sought against the State.*** The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and ***files a claim*** against the fund it waives any immunity which it otherwise might have had ***respecting adjudication of the claim.***

Gardner, 329 U.S. at 573-74 (citations omitted and emphasis added).

Thus, in *Gardner,* this Court held that when a state files a claim in a bankruptcy case, it waives its sovereign immunity respecting adjudication of that very claim. *Gardner,* 329 U.S. at 574. The Court based its decision in *Gardner,* in part, on its reasoning that when a state files a claim in a bankruptcy case, *no judgment is sought against*

the state. Id. at 574. *Gardner*, therefore, does not stand for the proposition that affirmative relief can be sought against a state when one of its agencies files a claim in a bankruptcy case, as was observed by this Court in *Seminole Tribe*, when it noted that it had never awarded monetary relief against a state under the Bankruptcy Code. *Seminole Tribe*, 517 U.S. at 73 n.16.

Section 106(b) of the Bankruptcy Code, on the other hand, plainly allows affirmative relief against a state that files a claim in a bankruptcy case. It conditions a state's filing of a claim on its waiver of immunity, not just with respect to adjudication of its claim, even to the point of extinguishing the claim, but also with respect to related monetary claims against the state. *Gardner* did not and could not have decided the constitutionality of such a waiver, because no counterclaims of any nature were asserted in *Gardner*.

Justice Scalia observed in a dissenting opinion to the plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 43 (1989) (a case now overruled by *Seminole Tribe*), the authority of Congress to so condition a state's participation in a federally regulated field has not been addressed by this Court.

> *Parden* is the only case in which we have held that the Federal Government can demand, as a condition to its permission of state action regulable under the Commerce Clause, the waiver of state sovereign immunity. Two terms ago, in *Welch*, we overruled *Parden* insofar as that case spoke to the clarity of language necessary to constitute such a demand. We explicitly declined to address, however, the continuing

> vitality of *Parden's* holding that the Commerce Clause provided the constitutional power to make such a demand. I would drop the other shoe.
>
> There are obvious and fatal difficulties in acknowledging such a power if no Commerce Clause power to abrogate state sovereignty exists. * * * [T]o acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the state's action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers – that is, to adopt the very principle I have just rejected.

Union Gas, 491 U.S. 43-44 (dissenting opinion) (citations and footnotes omitted).

This case presents the Court with the opportunity to consider the question left unanswered by the Court's Eleventh Amendment waiver decisions to date – that is, can Congress, acting pursuant to its Article I powers, deem state immunity waived by certain state conduct and define the scope of that waiver? This is an important question for the Court to consider because Congress has proceeded, with its enactment of Section 106(b), on the basis that it does have this authority – and not only to deem a waiver, but to define its scope. And, in defining the scope of the Eleventh Amendment waiver, Congress has not confined itself to the waiver standards announced by this Court.

B. The Tenth Circuit's Decision Conflicts with Other Circuits, and This Circuit Split Aggravates the Already Confusing Array of Authority Interpreting the Scope of the Section 106(b) Waiver.

The Tenth Circuit, in its decision below, concluded that Congress can deem state immunity waived by certain state action and that such a deemed waiver is distinguishable from an abrogation of immunity. The Fourth Circuit reached just the opposite conclusion and held that Section 106(b) is an unconstitutional abrogation of Eleventh Amendment immunity. *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997). The Eleventh Circuit has also questioned the constitutionality of Section 106(b) and has relied on common law waiver principles rather than applying the Section 106(b) standard. *In re Burke*, 146 F.3d 1313 (11th Cir. 1998).

In holding Section 106(b) unconstitutional, the Fourth Circuit reasoned:

> [T]he language of 11 U.S.C. § 106(b) itself – that a state is "deemed to have waived sovereign immunity" – amounts to language of abrogation. In that section, Congress unequivocally purports to say when states have no immunity from private suits in federal court. * * * While 11 U.S.C. § 106(b) may correctly describe those actions that, as a matter of constitutional law, constitute a state's waiver of the Eleventh Amendment, it is nevertheless not within Congress' power to abrogate such immunity by "deeming" a waiver. Rather, in the absence of a constitutional authorization, it lies solely within a state's sovereign power to waive its immunity

> voluntarily and to consent to federal jurisdiction. Only if it waives such immunity may a private citizen sue the state in federal court.

Creative Goldsmiths, 119 F.3d at 1147 (citations omitted).

Although the Fourth Circuit held Section 106(b) unconstitutional, it did not conclude that a state's filing of a claim in a bankruptcy case could not effect a waiver of immunity. The Fourth Circuit examined the facts of the case for a waiver, but rather than using the Section 106(b) standard, it attempted to use the standards enunciated in this Court's Eleventh Amendment waiver decisions. *Creative Goldsmiths*, 119 F.3d at 1147-48.

We are left then with two circuits, the Tenth and the Fourth, definitely split on the constitutionality of Section 106(b), and the Eleventh Circuit questioning its constitutionality and declining to apply it. Moreover, the Fourth Circuit itself appears to be confused when it states Section 106(b) may correctly state the common law waiver, when in fact Section 106(b) expands the waiver, as noted above, to allow for affirmative relief against the state. Adding to this confusion, are the varying decisions of other circuits in the breadth of the waiver they are willing to find in a state's filing of a claim in a bankruptcy case. *See In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996) (holding that agency's filing of a claim waived its immunity from action for damages arising out of automatic stay violation); *In re Rebel Coal Co.*, 944 F.2d 320 (6th Cir. 1991) (holding that civil penalty claims for separate civil violations did not arise out of the same transaction); *WJM, Inc. v. Mass. Dep't of Pub. Welfare*, 840 F.2d 996 (1st Cir. 1988) (allowing affirmative relief and holding that claims of two separate agencies did not arise out of same

transaction or occurrence, but claims of debtor and agency arising out of same contract did arise out of same transaction); *In re Friendship Medical Ctr.*, 710 F.2d 1297 (7th Cir. 1983).

The greatest variation in the interpretations given the waiver created by a state's filing of a claim in a bankruptcy case is found between the Tenth Circuit's decision in this case, as discussed above, and the Seventh Circuit's decision in *Friendship Medical Center*. In *Friendship Medical Center*, the Seventh Circuit very narrowly construed the waiver of immunity created by a state's filing of a claim in a bankruptcy case, applying a compulsory counterclaim standard and disallowing any affirmative relief against a state. The Seventh Circuit relied upon this Court's waiver analysis in *Gardner* and concluded that the waiver that results from filing a claim is limited to that necessary for disposition of the claim. *Friendship Medical Center*, 710 F.2d at 1300-01.

The above-described circuit split, both as to the constitutionality of Section 106(b) and the scope of the waiver created by a state's filing of a claim in a bankruptcy case, is an intolerable conflict that promises to aggravate the confusion already evident in the numerous decisions interpreting the scope of the Section 106(b) waiver. *Compare, In re Four Seasons Care Ctrs.*, 119 B.R. 681 (Bankr.D.Minn. 1990); *In re Mercy Hosp. of Watertown*, 138 B.R. 366 (Bankr.N.D.N.Y. 1992); *In re Rocchio and Sons, Inc.*, 165 B.R. 86 (Bankr.D.R.I. 1994); *White v. Dep't of Health and Human Serv.*, 171 B.R. 444 (Bankr.D.C. 1994); *In re Anton Motors, Inc.*, 177 B.R. 58 (Bankr.D.Md. 1995) (decisions narrowly construing the waiver); *with In re Cook United, Inc.*, 117 B.R. 301 (Bankr.N.D. Ohio 1990); *In*

re Lazar, 200 B.R. 358 (Bankr.C.D.Cal. 1996); *In re Charter Oak Assoc.*, 200 B.R. 17 (Bankr.D.Conn. 1996) (decisions broadly construing the waiver).

The varying analyses of these courts, and of the circuit courts, and, in fact, of the Tenth Circuit itself (comparing *Murdock*, *Haldeman* and *Graham*), illustrates the need for this Court's guidance in determining the scope of the waiver which may constitutionally result from a state filing a claim in a bankruptcy case.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that the Court grant a writ of certiorari.

Respectfully submitted,

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In re Beverly A. STRAIGHT and Milton L. Straight, a.k.a. Milton Lloyd Straight, Milton Straight, Mickie Straight, Debtors,

WYOMING DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellant,

v.

Beverly A. STRAIGHT and Milton L. Straight, Appellees.

Business Bankruptcy Law Committee of the New York County Lawyers' Association, Amicus Curiae.

No. 97-8053.

United States Court of Appeals,
Tenth Circuit.

June 9, 1998.

Chapter 13 debtor challenged Wyoming Department of Transportation's decertification of debtor's status as disadvantaged business enterprise on grounds that it violated stay. After finding stay violation, the Bankruptcy Court ordered Department to pay debtor's attorney fees and costs. Department appealed. The United States District Court for the District of Wyoming, Alan B. Johnson, Chief Judge, 209 B.R. 540, affirmed. Department appealed. The Court of Appeals, John C. Porfilio, Circuit Judge, held that: (1) Department was part of same governmental unit as other state agencies for purposes of Bankruptcy Code's claim-specific sovereign immunity waiver provision; (2) debtor's claim against Department was estate property; (3) claims asserted against debtor by other state agencies arose out of same transaction or occurrence as debtor's claim against Department; and (4) Wyoming waived its Eleventh Amendment immunity

when its agencies filed proofs of claim against debtor, giving bankruptcy court authority to order Department to pay costs and fees associated with its stay violation.

Judgment affirmed; motion to strike granted.

Jennifer Ann Evans, Sr. Asst. Atty. Gen. (William U. Hill, Atty. Gen., with her on briefs), Cheyenne, WY, for Plaintiff-Appellant.

Leonard H. Gerson, Angel & Frankel, P.C., New York City, for Amicus Curiae.

David J. Bederman (Stephen R., Winship, Winship & Winship, P.C., Casper, WY, with him on briefs) Professor at Law, Emory University, Atlanta, GA, for Debtors-Appellees.

Before SEYMOUR, Chief Judge, PORFILIO, Circuit Judge, and HENRY, Circuit Judge.

JOHN C. PORFILIO, Circuit Judge.

The State of Wyoming, through its Department of Transportation (Department), challenges the jurisdiction of the bankruptcy court to enter an order directing the Department to pay attorneys' fees and costs related to its violation of stay provisions of the Bankruptcy Code found in 11 U.S.C. §§ 362 and 525. Wyoming claims the sovereign immunity vested in it by the Eleventh Amendment puts its agencies beyond the jurisdictional reach of the bankruptcy court. Sitting in its appellate capacity, the district court disagreed, ruling Congress had the power to abrogate states' immunity when enacting the Bankruptcy Code. In an alternative ruling, the district court also held the State of Wyoming waived its immunity when its Workers' Safety and Compensation Division and

its Department of Employment filed proofs of claim in the bankruptcy case of appellee, Ms. Beverly Straight. We agree with the district court that when the State sought the benefits available to it under the Bankruptcy Code, it acceded to the jurisdiction of the bankruptcy court. Therefore, it cannot stand upon sovereignty to avoid the onus of Code provisions it now finds disagreeable.

BACKGROUND

Ms. Straight, doing business as Centerline Traffic Control & Flagging, filed a petition for relief under Chapter 13 of the Bankruptcy Code. At the time of filing, Ms. Straight was certified by the State of Wyoming as a Disadvantaged Business Enterprise (DBE). Approximately one month after filing, the Department of Transportation notified Ms. Straight of its intent to decertify her DBE status. In its notice, the Department stated:

> 49 CFR 23.45(f)3(iv) require[s] Wyoming Department of Transportation to "analyze the bonding and financial capacity of the firm" for eligibility in the DBE program. DBE Definition 1.A(b) states a "disadvantaged business" means a small business concern is one "whose management and daily business operation are controlled by one or more of the socially and economically disadvantaged individuals who own it."
>
> It is apparent that you have lost the ability to control the financial capacity of this firm. By filing for Chapter 13 bankruptcy, you have also lost the ability to control your business; that control now lies in the hands of the Bankruptcy Court and the Bankruptcy Trustee.

The following month, the Department did decertify Ms. Straight, and in response, she filed a motion in the bankruptcy court for an order to show cause and for a contempt citation. Upon consideration, the court issued an order finding the State had violated the automatic stay provision of 11 U.S.C. § 362 and held the decertification was "wrongful" under § 525(a) which prohibits certain discriminatory action against a bankruptcy debtor. The court ordered the Department to recertify Ms. Straight as a DBE and to pay Ms. Straight's attorneys' fees and costs.

Although the State did not appeal that order, it did appeal a subsequent order approving the amount of fees and costs to be awarded Ms. Straight. The district court affirmed, disagreeing with the State's contention the bankruptcy court had no jurisdiction over it. The court reasoned 11 U.S.C. § 106(a), putatively abrogating the State's Eleventh Amendment immunity, was constitutionally enacted pursuant to the Fourteenth Amendment; hence, Congress had the power and intent to abrogate Wyoming's sovereign immunity. *In re Straight*, 209 B.R. 540, 555 (D.Wyo.1997). Alternatively, the court held proofs of claim filed by the Wyoming Department of Employment and the Wyoming Workers' Safety and Compensation Division had waived the State's Eleventh Amendment immunity. *Id.* The district court held pursuant to 11 U.S.C. § 106(b), the State's claim for unpaid taxes arose from the same transaction as its attempt to decertify the Debtor. Thus, having filed the claims for unpaid taxes and premiums, the State waived its immunity against the Debtor's action. *Id.* at 557. This appeal followed.

I.

Relying principally on *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (upholding Eleventh Amendment immunity in the face of a federal statute granting federal courts jurisdiction over a state), the State urges us to hold the district court erred in concluding 11 U.S.C. § 106(a) abrogates the State's immunity in bankruptcy. Nonetheless, we do not reach that argument. While we do not denigrate the importance of the § 106(a) issue raised by the State, we believe it has been mooted by the State's own action.

We start from the general premise that the law of bankruptcy is founded upon principles of equity. That foundation requires all persons or entities in the same class must be treated alike. Thus, creditors coming to the bankruptcy court for relief expect they will fare no better or no worse than others of their stature. Moreover, the whole concept of bankruptcy cannot succeed without a careful application of these principles and a forthright dedication to their significance.

For that reason, any governmental entity which elects to join the ranks of creditors seeking benefits the bankruptcy court can allocate must recognize that resort is subject to the mantle of equity. Indeed, "[w]hen the State becomes the actor and files a claim against the [bankruptcy] fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Gardner v. New Jersey*, 329 U.S. 565, 574, 67 S.Ct. 467, 472, 91 L.Ed. 504 (1947). The Seventh Circuit has recently reached a similar conclusion. In *Dekalb County v. Platter*, 140 F.3d 676 (7th Cir.1998), the court was called upon to

resolve whether the state's claim of Eleventh Amendment immunity barred an action in bankruptcy court to determine dischargeability of a debt. Relying in part upon *Gardner,* the court concluded it did not because the state had waived the bar by filing the case in the first instance. Neither of these cases relies upon any basis for decision other than the state's having acceded to the jurisdiction of the bankruptcy court by seeking its relief against the debtor.

In 1994, Congress amended 11 U.S.C. § 106(b) to alert any governmental unit that when it voluntarily enters the arena of the bankruptcy court seeking relief in a debtor's case, it may do so as a creditor and not a sovereign. The statute provides:

> A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

This enactment codifies the *Gardner* rule, see 2 *Collier on Bankruptcy* ¶ 106.05 (15th ed. rev.1997), but narrows its applicability to permit the debtor to proceed only against claims asserted by the state that arose out of the same transaction or occurrence as a claim previously filed by the state in the bankruptcy estate.

II.

Ms. Straight contends § 106(b) appropriately governs the State's claim of Eleventh Amendment immunity in

this case. Consideration of the contention, then, requires we answer four questions: 1) What is a "governmental unit" and does Wyoming fit that definition in this case; 2) if so, has the Debtor asserted a claim against Wyoming that is "property of the estate"; 3) did that claim arise "from the same transaction or occurrence" as the proofs of claim previously filed by the State? Finally, if we decide § 106(b) is germane, we then must determine whether it has been adversely affected by *Seminole Tribe*.

The foundation for the State's argument that § 106(b) is inapplicable is based upon a creative, albeit limited, view of the definition of "governmental unit" as that term is used in § 106(b). Wyoming maintains its Department of Transportation is a different "governmental unit" from the Department of Employment and the Workers' Safety and Compensation Division, both of which filed claims against the estate.[1] Indeed, appellant asserts the Department of Transportation is a governmental unit distinguishable from the State itself. That position is unsupportable.

In the context of the Bankruptcy Code, "governmental unit" means:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a

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[1] The Department of Employment filed a claim for $2,474.88 for unpaid unemployment taxes and interest, and the Workers' Safety and Compensation Division filed a claim for $27,597.42 for unpaid workers' compensation premiums.

> State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government. . . .

11 U.S.C. § 101(27). The plain language of this section, then, makes clear a state, or a department, agency, or instrumentality of a state are governmental units for the purposes of the Bankruptcy Code. Nonetheless, Wyoming argues the conjunction "or" separating the word "State" from the words "department, agency, or instrumentality of . . . a State" implies a governmental unit "can mean either a state or a state agency, but it cannot mean both at the same time." Wyoming cites no authority for this conclusion.

We view the theory as rather remarkable. Like most states, Wyoming acts through its departments and agencies. The Wyoming Supreme Court, for example, has noted a school district, as a creation of the state, cannot sue the state because "[o]ne cannot sue himself." *Carbon County Sch. Dist. No. 2 v. Wyoming State Hosp.*, 680 P.2d 773 (Wyo.1984). In adopting the Wyoming Code of Civil Procedure, the state legislature, has made clear the state and its agencies are the same. *See* Wyo. Stat. § 1-39-103(a)(vi) (1998) (" 'State' or 'state agency' means the state of Wyoming or any of its branches, agencies, departments, boards, instrumentalities or institutions."). *See also Wyoming v. Board of County Comm'rs*, 642 P.2d 456, 457-58 (Wyo.1982) (County, as agency of the state, cannot sue the state because it is "part of the state itself" and "[o]ne cannot sue himself."). Also, in a similar case, we have held the federal government and its agencies are the same and unitary for the purposes of bankruptcy. *Turner v. SBA*, 84 F.3d 1294, 1299 (10th Cir.1996).

We are convinced the State of Wyoming is not an amalgam of separate, independent, and self-sustaining branches. Like the federal government, in bankruptcy it should be regarded as one unified entity with different arms through which it carries out the affairs of the state. For that reason, Wyoming cannot succeed in this case with its contention the Department of Transportation is not the same governmental unit as its sister agencies for the purpose of applying § 106(b).

III.

That leads us to consideration of whether Ms. Straight has asserted a claim against Wyoming that is property of the estate. Although one might expect that claims of this nature are normally for money damages, the action before us at this time seeks a recovery that is not essentially monetary. In filing her motion to show cause and for contempt, Ms. Straight, as a Chapter 13 debtor, initially sought the restoration of the certificate she owned prior to bankruptcy that was essential to the conduct of her postpetition business. Without that certificate, she could not conduct her affairs as a flagging contractor, nor could she effect a Chapter 13 plan. We believe, therefore, there can be no doubt that in this quest the Debtor was in every sense seeking the return of property of the estate as that concept is broadly defined in 11 U.S.C. § 541(a)(1). *See In re National Cattle Congress, Inc.* 179 B.R. 588, 593 (Bankr.N.D.Iowa 1995) (a license essential to the conduct of the debtor's business is property of the estate); *In re Central Ark. Broad. Co.*, 170 B.R. 143, 146 (Bankr.E.D.Ark.1994) (same); *In re Draughon*

Training Inst., Inc., 119 B.R. 927, 931 (Bankr.W.D.La.1990) (same).

IV.

Finally, we must determine whether the claims asserted by the Department of Employment and the Workers' Safety and Compensation Division "arose out of the same transaction or occurrence" as the claim brought by the Debtor. As noted by the district court, this concept is not peculiar to bankruptcy. It follows the language of Fed.R.Civ.P. 13(a) dealing with compulsory counterclaims. *See 2 Collier on Bankruptcy* ¶ 106.5 (15th ed. rev.1997). We need not delve deeply into Rule 13(a) analysis here, however, as the State has furnished sufficient evidence to remove all doubt that the filings of its proofs of claim against the Chapter 13 case were linked to the decertification which prompted Ms. Straight's initial action.

Following the original ruling of the bankruptcy court holding the Department of Transportation had violated both §§ 362 and 525(a) of the Bankruptcy Code, the Department filed a motion for new trial. In an effort to convince the bankruptcy court that it had taken no prejudicial action against the Debtor prohibited by § 525, the Department asserted in the motion:

> WYDOT [Wyoming Department of Transportation] did not violate 11 U.S.C. § 525(a) because it did not suspend Debtor's Certification based on the Chapter 13 filing. WYDOT suspended Debtor **based** on the revocation of Debtor's **bonding and on the amount of unpaid payroll liability owed by Debtor.**

(emphasis added). Aside from the fact the first sentence appears somewhat disingenuous when placed in juxtaposition with the letter giving Ms. Straight notice of the Department's intent to decertify, this admission is critical because both the "bonding" and "payroll" liability were directly related to the operation of her business. We believe it thus clear that the proofs of claim filed by the State and the motion filed by Ms. Straight arose out of the same transaction or occurrence – the Debtor's business.

We conclude, then, the action initiated by the Debtor properly falls under § 106(b). The only unanswered question is whether that section has been vitiated by the Court's holding in *Seminole Tribe*. This is a matter upon which courts have not agreed.

V.

As already noted by the district court, *In re Straight*, 209 B.R. at 555-56, a number of courts have held § 106(b) is unaffected by *Seminole Tribe*.[2] There are others, however, who disagree. Most notable is *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir.1997), in which the Fourth Circuit holds, in keeping with *Seminole Tribe*, 11 U.S.C. § 106(a) offends the Eleventh Amendment. In passing, the court also states that § 106(b) is similarly afflicted. *Id.* at 1147. We do not find that statement persuasive.

First, it is really dictum. The underlying action was one in which the bankruptcy trustee filed a preference

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[2] *See, e.g., In re Charter Oak Assocs.*, 203 B.R. 17, 21-22 (Bankr.D.Conn.1996); *In re Lazar*, 200 B.R. 358, 377 (Bankr.C.D.Cal.1996).

action against the state for refund of income taxes paid prior to bankruptcy. Although the state had filed claims for other taxes owed by the debtor, the trustee never asserted the income tax payment he sought to recover was kin in any way to those claims. Therefore, the court held, those claims and the trustee's complaint against the state did not arise from the same transaction or occurrence. *Id.* at 1149. Because the statutory predicate was unsatisfied, § 106(b) could not be urged, and the issue of its constitutionality was really not before the court. There is an even stronger reason for disagreement with the Fourth Circuit's view of this question, however.

We see a significant difference between the universal abrogation of immunity provided in § 106(a) and the narrow waiver established in § 106(b). The principal teaching of *Seminole Tribe* is that Congress cannot abrogate Eleventh Amendment immunity without an "unmistakably clear intent to abrogate" and the "valid exercise of power." *Seminole Tribe*, 517 U.S. at 57-58, 116 S.Ct. at 1124. But § 106(b) does not pretend to abrogate a state's immunity, it merely codifies an existing equitable circumstance under which a state can choose to preserve its immunity by not participating in a bankruptcy proceeding or to partially waive that immunity by filing a claim. The choice is left to the state. Thus, § 106(b) follows the lead already established by the Supreme Court in *Gardner v. New Jersey*.

It is noteworthy, then, that *Gardner* is neither discussed nor in any way affected in *Seminole Tribe*. The omission is significant because it underscores the ability of Congress to draw the equitable line across which the

state has the option to cross. Unlike § 106(a) which purports to abolish sovereign immunity across the board, § 106(b) leaves the choice to the governmental unit. It can eschew bankruptcy relief and retain its immunity, or it can doff the protective cloak and join the ranks of creditors seeking the benefits from the debtor's estate. That choice is not constitutionally profound, and it is in accord with one of the fundamental principles of bankruptcy. *Dekalb County*, 140 F.3d at 678-79. *See also New York v. Irving Trust Co.*, 288 U.S. 329, 333, 53 S.Ct. 389, 391, 77 L.Ed. 815 (1933) ("If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements . . . otherwise . . . a fundamental purpose of [bankruptcy] would be frustrated.").

CONCLUSION

Because the district court correctly held the State of Wyoming waived its Eleventh Amendment immunity by filing proofs of claim in this case, its judgment is **AFFIRMED** on that ground alone. Appellant's motion to strike the supplemental authority of the amicus is **GRANTED.**

In re Beverly A. STRAIGHT, d/b/a Centerline Traffic Control & Flagging, and Milton L. Straight, a/k/a Milton Lloyd Straight, Milton Straight, Mickie Straight, Debtors.

WYOMING DEPARTMENT OF TRANSPORTATION,
Appellants,

v.

Beverly A. STRAIGHT and Milton Lloyd Straight, Appellees.

Bankruptcy No. 95-10007.
Adversary No. 96-CV-0184-J.

United States District Court,
D. Wyoming.

May 15, 1997.

Lawrence A. Bobbitt, Senior Assistant Attorney General, Wyoming Attorney General, Cheyenne, WY, for appellant.

Stephen R. Winship, Winship & Associates, Casper, WY, for appellees.

ORDER GRANTING IN PART AND DENYING IN PART APPELLEES' MOTION TO DISMISS APPEAL

and

OPINION AND ORDER ON BANKRUPTCY APPEAL, AFFIRMING BANKRUPTCY COURT

ALAN B. JOHNSON, Chief Judge.

The Appellees' Motion to Dismiss Appeal and the Appellant's response thereto, as well as the Appellant's

bankruptcy appeal, came before the Court for hearing on November 7, 1996. Counsel for the parties appeared and presented arguments in support of their respective positions on all outstanding issues, including the substance of the instant bankruptcy appeal. This Court has reviewed the record on appeal, the pleadings of record and the briefs of appellants and appellees, and is fully advised in the premises. For the following reasons, the Court finds that the Appellee's Motion to Dismiss Appeal should be GRANTED, insofar as the motion seeks dismissal of issues relating to the adequacy of notice and seeks to challenge the contempt citation issued by the bankruptcy court September 20, 1995, and DENIED, to the extent that the motion seeks dismissal of issues relating to the Order Approving Payment of Fees and Costs entered by the United States Bankruptcy Court for the District of Wyoming on July 11, 1996. The Court further finds that the bankruptcy court's order granting fees and costs in favor should be AFFIRMED, in favor of appellees.

Background

The debtors, Beverly A. Straight, d/b/a Centerline Traffic Control & Flagging, and Milton L. Straight, filed for relief under Chapter 13 of the Bankruptcy Code on January 13, 1995. Ms. Straight is a highway flagging contractor certified by the State of Wyoming as a "Disadvantaged Business Enterprise" (DBE) under guidelines of the Federal Highway Administration for funding of highway construction projects. Most of Ms. Straight's income was derived from work done as a subcontractor on federal highway projects. In 1994, a general contractor did not pay Straight or other subcontractors for work done on

a highway construction project. Consequently, Straight was compelled to seek bankruptcy protection. Two agencies of the State of Wyoming filed proofs of claim in the Chapter 13 bankruptcy proceeding. Wyoming Worker's Safety and Compensation filed a claim on March 28, 1995 in the amount of $27,597.42 for unpaid workers' compensation premiums. The Wyoming Department of Employment filed a claim for $2,474.88 for unpaid unemployment taxes and interest.

On February 10, 1995, after the debtors' Chapter 13 petition had been filed, the Department of Transportation gave notice to Straight of its intent to decertify Straight's DBE status. The letter states:

> We have just received copies of papers filed by Beverly Ann Straight in the United States Bankruptcy Court for the District of Wyoming January 13, 1995.
>
> 49 CFR 23.45(f)3(iv) require[s] Wyoming Department of Transportation to "analyze the bonding and financial capacity of the firm" for eligibility in the DBE program. DBE Definition 1.A(b) states a "disadvantaged business" means a small business concern is one "whose management and daily business operation are controlled by one or more of the socially and economically disadvantaged individuals who own it."
>
> It is apparent that you have lost the ability to control the financial capacity of this firm. By filing for Chapter 13 bankruptcy, you have also lost the ability to control your business; that control now lies in the hands of the Bankruptcy Court and the Bankruptcy Trustee.

> Therefore, in accordance with the 1994 Wyoming Department of Transportation Disadvantaged Business Enterprise Plan, Section Ten – Decertification, you are hereby notified of our intent to decertify. You have 14 calendar days from receipt of this letter to show cause why your firm should not be decertified.
>
> If you have any further questions, please feel free to contact this office.

The letter was signed by Leroy T. Wells, P.E., DBE Liaison Officer for the Department of Transportation. The agency's letterhead gave as its address: The Department of Transportation, 5300 Bishop Boulevard (82009), P.O. Box 1708, Cheyenne, Wyoming 82003-1708. R.O.A., Vol. 1, at 80.

The attorney for the debtor responded to the department by letter dated March 14, 1995. The letter discussed Chapter 13 bankruptcy relief, and also noted that 11 U.S.C. § 525(a) prohibits any "discrimination based on a bankruptcy filing including the denial, revocation, suspension or refusal to renew a license, permit, chapter, franchise or other similar grant because that person has filed for protection under the Bankruptcy Code." R.O.A., Vol. 1 at 80-81.

Counsel for the Department of Transportation, Mr. Bobbitt with the Wyoming Office of the Attorney General, responded to the letter on March 24, 1995. The letter indicates that "no action is being taken against your client solely because of her bankruptcy action. No claim is being made against the estate, and, no change is being made to existing contracts or to funds related thereto." The letter continues:

> Federal regulations as set forth in 49 CFR 23.45(f)(3)(iv) require WYDOT to determine whether a firm is an "eligible disadvantaged business enterprise." In making such a determination, WYDOT shall, "Analyze the bonding and financial capacity of the firm." WYDOT is proceeding against Centerline based upon consideration of the future responsibility of the company. This determination is made with respect to all DBE contractors, whether or not they have sought bankruptcy protection. In other words, WYDOT is concerned with the future financial responsibility of the debtor, not with the discharge of her debts, etc. under the bankruptcy code.
>
> It is our understanding that the bankruptcy code was not intended to be a shield for debtors from reasonable inquiries about their ability to manage financial matters, particularly where their ability to do so is related to their fitness to continue as a DBE. The actions initiated by WYDOT serve a legitimate statutory purpose, the[y] protect the public funds involved in highway contracts. They are not due to any bankruptcy proceeding.
>
> * * *

R.O.A., Vol. 1 at 84-85.

On March 28, 1995, the DOT did decertify Centerline as a DBE. The debtors filed their motion to show cause, and for a contempt citation on July 25, 1995. The debtor sought a determination that the State of Wyoming be adjudged in contempt for violating the automatic stay imposed pursuant to 11 U.S.C. § 362 and for violation of the bankruptcy code's protections against discriminatory treatment, as set forth in 11 U.S.C. § 525. The debtors also

sought damages resulting from the decertification of the debtor's DBE status. R.O.A., Vol. 1 at 77. This motion was served upon the Wyoming Department of Transportation, P.O. Box 1708, Cheyenne, WY 82003-1708. It does not appear that a copy was sent to the Attorney General's Office. No appearance or proof of claim had been filed by the Attorney General's Office or any other representative of the State of Wyoming's Department of Transportation.

The bankruptcy court entered its order to show cause and setting hearing on the motion on July 31, 1995. That order provided:

> . . . that a representative of the Wyoming Department of Transportation appear before this Court on the 15th day of August, 1995 at the hour of 8:30 a.m. at the Federal Courthouse, First Floor Courtroom, First and Wolcott, Casper, Wyoming and show the Court why it should not be adjudged in contempt of this Court for its violation of the automatic stay and the anti-discrimination provisions of the Bankruptcy Code, why the Debtors' certification under the Disadvantaged Business Enterprise Program as approved by the Federal Highway Administration should not be restored and why it should not have to pay damages resulting from its improper revocation of Debtors' Disadvantaged Business Enterprise certification.

The Department of Transportation did not file a response to the motion prior to the hearing held August 15, 1995. Additionally, neither DOT or its counsel appeared at the hearing held on August 15, 1995. However, later on August 15, 1995, after the bankruptcy court's Order on Motion For Contempt Citation had been

signed, counsel for the Wyoming DOT filed its "Motion to Strike Demand for Damages and Otherwise Dismiss Order to Show Cause and/or Contempt Citation and Requesting Hearing." In that motion, the DOT stated, in part:

> 1. The Disadvantaged Business Enterprise (DBE) certification held by Debtor in the name of Centerline Traffic Control and Flagging was not revoked because of the Debtor's filing of a petition under the Bankruptcy Code but because the company was not financially responsible enough to be able to be bonded by any reputable bonding company in that Debtor admits to owing $90,316.00 in accrued payroll taxes. Such bonds are required by the primary contractors seeking to use Centerline, and not by Respondent[.]

R.O.A., Vol. 1 at 73-74.

The Bankruptcy Court entered its "Order on Motion for Contempt Citation" on September 20, 1995. In that order, the bankruptcy court made the following findings:

> 1. On January 13, 1995, Beverly Ann Straight and Milton L. Straight filed their voluntary Chapter 13 petition. Mrs. Straight is engaged in a highway flagging business called Centerline Traffic Control and Flagging (Centerline). The DOT received notice of the bankruptcy filing.
>
> 2. On February 15, 1995, the DOT issued Mrs. Straight's business a Disadvantaged Business Enterprise (DBE) certification. This was a recertification that entitled Mrs. Straight to bid for subcontracting jobs on state highway projects which are federally funded, and for which

the prime contractor obtains financial incentives by hiring the DBE certified business owner. The federal certification process is conducted through the DOT, which also lets the construction bids.

3. In a March 10, 1995 letter, a DOT officer stated his intention to decertify Centerline as a DBE because Mrs. Straight had filed a chapter 13 bankruptcy and "lost the ability to control (her) business; that control now lies in the hands of the Bankruptcy Court and the Bankruptcy Trustee." This erroneous statement of the law by the DOT officer demonstrates a complete misunderstanding of the chapter 13 process.

4. On March 28, 1995, despite communications from Mr. Winship, the DOT did decertify Centerline. The reason given at that time was that Mrs. Straight was not operating an independent business because she did not "possess the financial and bonding resources necessary to operate the business in its field of work." However, Mrs. Straight did provide evidence of bonding through Western States Bonding. This fact was acknowledged, but rejected as determinative, by the DOT officer in a May 15, 1995 letter.

5. In the meantime, and due to the loss of the DBE status, Mrs. Straight lost at least two (2) separate construction contracts for summer, 1995 work.

6. The DOT is a governmental unit. The moment the DOT officer sent the March 10, 1995 letter, the DOT was in clear violation of the anti-discrimination provisions of 11 U.S.C. § 525(a). *In re Exquisito Services, Inc.*, 823 F.2d 151, 155

(5th Cir.1987). Section 525 prohibits a governmental unit from revoking or suspending a license, permit, or similar grant of a person solely because that person is a debtor under the Bankruptcy Code. And following Mr. Winship's letter of March 14, 1995, specifically informing the DOT of § 525, the DOT proceeded to decertify Centerline anyway.

7. The debtor's testimony, the tenor of the DOT letters, and the apparent intransigence of the DOT officer convince the court that the subsequently stated reasons for revoking the DBE certificate were merely pretext and an attempt to excuse actions clearly wrongful under § 525. The DOT has failed to provide any non-bankruptcy related justification for its action, particularly after Mrs. Straight provided a surety bond and additional financial information as requested.

8. The DOT officer's actions were also a violation of the automatic stay imposed by § 362(a)(3). That section prohibits any act to exercise control over property of the estate without first obtaining appropriate relief from the bankruptcy court. The DBE certification is a financial interest which provides a pecuniary advantage to the debtor and as such, is property of the bankruptcy estate. 11 U.S.C. § 541(a) (1); *In re Metro Transp. Co.*, 64 B.R. 968, 973 (Bankr.E.D.Pa.1986) (PUC taxi cab certificates to operate are part of debtor's estate); *In re St. Louis South Park II, Inc.*, 111 B.R. 260 (Bankr.W.D.Mo.1990) (nursing home certificate of need protected by automatic stay).

9. There is an exception for certain governmental action, which is found in § 362(b)(4).

That section excepts actions by a governmental unit to enforce that entity's police or regulatory power. In the Tenth Circuit, the two (2) tests used to determine whether the § 362(b)(4) exception applies are found in *Eddleman v. U.S. Dept. of Labor,* 923 F.2d 782, 790-791 (10th Cir.1991). Under the "pecuniary purpose test," the DOT action might be excepted because the state government has no pecuniary interest in Centerline's DBE status.

10. The "public policy" test distinguishes between governmental proceedings aimed at effectuating public policy and those aimed at adjudicating private rights. *Id.* In the case of *In re Medicar Ambulance Co. Inc.,* 166 B.R. 918 (Bankr.N.D.Ca.1994), the court elaborated on the public policy test, stressing the distinctions. A court should determine whether the action is an attempt to prevent future violations of the law, which falls under the public policy exception, or an attempt to determine the liability of private parties. In a thorough discussion, that court held that the suspension of Medicare payments by the United States Department of Health and Human Services was a violation of the automatic stay.

11. In this case, the DOT was not promoting the public safety when it interfered with Beverly Ann Straight's ability to continue her business. One of the stated reasons for revoking the DBE status was that the debtors owed accrued payroll taxes in excess of $90,000. Clearly, the DOT action was based on pecuniary considerations, rather than public policy matters. *Bd. of County Comm'rs of County of Archuleta v. Fairfield Communities, Inc.,* 122 B.R. 128

(D.Colo.1990). This action was willful and is precisely the type of action that the automatic stay is intended to prevent. *In re Christensen*, 167 B.R. 213, 217 (D.Or.1994); *In re Kuck*, 116 B.R. 821 (Bankr.S.D.Ala.1990).

12. The law is well-settled that a violation of the automatic stay is void *ab initio*. *In re Calder*, 907 F.2d 953, 956 (10th Cir.1990). This court has the power to reinstate the debtor's DBE status or declare it unaffected by the decertification. *In re Exquisito Services*, 823 F.2d at 155.

13. Under § 105 and § 362(h), the court also has the authority to award costs and attorney fees to the debtor for willful violations of the automatic stay. Compensatory damages are also contemplated and are not barred by assertions of Eleventh Amendment sovereign immunity. 11 U.S.C. § 106(a)(3) (1994).

R.O.A., Vol. 1 at 68.

Subsequently, the DOT filed a "Motion for a New Trial," seeking to set aside the Court's Order on Motion for Contempt Citation and a new trial. It asserted a denial of due process in that it did not receive notice of the hearing, offering in support of the motion various affidavits of state employees. The motion also stated, in part:

2. WYDOT did not violate 11 U.S.C. § 525(a) because it did not suspend Debtor's Certification based on the Chapter 13 filing. WYDOT suspended Debtor based on the revocation of Debtor's bonding and on the amount of unpaid payroll liability owed by Debtor. . . .

3. WYDOT as an agency of the State of Wyoming has sovereign immunity barring the Court from awarding attorney fees. Further,

> monetary damages are not recoverable against a state for violation of the automatic stay. . . .

R.O.A., Vol. 1 at 50.

The debtor objected to the motion. R.O.A., Vol. 1 at 47. The bankruptcy court then held a hearing and, following the hearing, determined that the DOT's Motion for a New Trial should be denied. The bankruptcy court fully considered the due process and notice issues that had been raised by the DOT. The bankruptcy court noted that the DOT's "internal mail distribution is not efficient." R.O.A., Vol. 1 at 43. That court also considered DOT's argument that its counsel should have been given notice of the hearing, even though no appearance had been entered at the time. The bankruptcy court rejected the DOT's arguments, and determined that:

> When a state or agency is sued, service is made as prescribed by the law of the state. Rule 4(d)(5) of the Wyoming Rules of Civil Procedure requires service on an agency of the state to the agency's chief executive officer, its secretary, clerk, person in charge of its principal office or place of business, or any member of its governing body. Delivery by mail to the DOT's principal place of business satisfied the notice requirements of Rule 4. The Wyoming Rules do not require notice to the Attorney General.

R.O.A., Vol. 1 at 46.

The DOT appealed this Order on December 6, 1995. R.O.A., Vol. 1 at 39. On May 14, 1996, an "Order Dismissing Appeal" was entered, dismissing the appeal upon motion of the State of Wyoming.

Then, after considering the Amended Statement of Fees and Costs filed by the debtors' attorney, the bankruptcy court entered the "Order Approving Payment of Fees and Costs" on July 11, 1996. In it, the bankruptcy court ordered the State of Wyoming to pay the allowed fees and costs in the amount of $1,949.94 for its violation of the automatic stay. R.O.A., Vol. 1 at 31. On July 19, 1996, the Wyoming Department of Transportation filed its "Notice of Appeal Under 28 U.S.C. § 158(a) or (b) from a Final Order of the Bankruptcy Court." R.O.A., Vol. 1 at 29. It is only the bankruptcy court's decision to award fees and costs for violation of the automatic stay that is properly before this Court in the instant appeal.

In this appeal, the issues raised by the DOT are whether the bankruptcy court could properly award attorney's fees and costs for violation of the automatic stay. The DOT argues that Eleventh Amendment immunity precludes the bankruptcy court from awarding fees and costs against it, as it is an arm of the state entitled to such immunity. Necessarily, this requires the Court to attempt to engage in an analysis of *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the most recent pronouncement by the United States Supreme Court regarding Eleventh Amendment immunity.

Additionally, the DOT argues that it has not waived immunity and that the filing of proofs of claim by other state agencies, including those filed by Workers' Compensation for unpaid workers' compensation premiums and the Department of Employment for unemployment taxes, do not effectively waive immunity for the Department of Transportation, a separate state agency. The

debtors have argued to the contrary and assert that the filing of a proof of claim by one state agency serves as a waiver of Eleventh Amendment immunity for all state agencies.

Discussion

1. Notice and due process

These matters have not been timely appealed. Additionally, the State dismissed its appeal of the bankruptcy court's "Order on Motion for Contempt Citation" finding the DOT to be in violation of the automatic stay. R.O.A., Vol. 1 at 32. Rule 8002 of the Federal Rules of Bankruptcy Procedure provides that an appeal from a final judgment, order, or decree shall be taken by filing a notice of appeal within 10 days of the date of the entry of the judgment, order, or decree appealed from. The state did timely appeal the Order on Motion for Contempt Citation; that appeal was dismissed. When it raised issues relating to the propriety of that order in the instant appeal, it attempted to appeal something that has already been dismissed upon the State's own motion. It cannot now resurrect that appeal, and any attempt to do so is not timely.

Notwithstanding that finding, the Court agrees with the bankruptcy court's comments in its "Order on Motion for New Trial," R.O.A., Vol. 1 at 41, that the DOT's internal system for handling of mail is not efficient. Furthermore, at the hearing held before this Court, counsel admitted that the address used by the DOT was P.O. Box 1708. That is where the notice of the hearing went; that is where the notice was received.

While the debtor's counsel failure to serve counsel for the DOT at the Attorney General's office may in fact raise ethical considerations, that does not change the fact that service was properly accomplished upon the agency in accordance with state law. With that said, the Court finds that the DOT's attempt to appeal issues relating to the notice it received of the hearing on the order to show cause are not timely. The debtors' Motion to Dismiss, to the extent that it seeks dismissal of an untimely appeal of the bankruptcy court's September 20, 1995 "Order on Motion for Contempt Citation" shall be GRANTED.

The Court will proceed to consider the more substantive, and troublesome, aspects of the instant appeal – issues relating to the State's Eleventh Amendment immunity and the impact of *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) on that issue.

2. Sovereign immunity

In *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the United States Supreme Court considered whether Congress had the authority to abrogate states' sovereign immunity under the Indian Commerce Clause, U.S. Const., Art. I, § 8. The statute at issue was the Indian Gaming Regulatory Act, 25 U.S.C. § 2702, which provided for the operation and regulation of gaming by Indian tribes. The Seminole Tribe sued the State of Florida and its governor in 1991, asserting that Florida had refused to enter into any negotiation for inclusion of certain gaming activities in a tribal state compact in violation of the requirement of good faith

negotiation set forth in 25 U.S.C. § 2710(d)(3). The State argued that the suit violated its sovereign immunity from suit in federal court. On appeal, the Eleventh Circuit held that the Eleventh Amendment barred the suit against the state, agreeing with the district court's finding that Congress, in § 2710(d)(7) did intend to abrogate the States' sovereign immunity, and agreeing with the determination that the Indian Regulatory Act had been passed pursuant to Congress' power under the Indian Commerce Clause of Article I, § 8 of the Constitution. The circuit court, disagreeing with the district court, concluded however, that Congress was without the power to abrogate a State's Eleventh Amendment immunity from suit under the Indian Commerce Clause.

Certiorari was granted by the Supreme Court to consider two specific issues:

> (1) Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?; and (2) Does the doctrine of *Ex Parte Young* permit suits against a State's governor for prospective injunctive relief to enforce the good faith bargaining requirement of the Act? We answer the first question in the affirmative, the second in the negative, and we therefore affirm the Eleventh Circuit's dismissal of petitioner's suit.

Seminole Tribe, ___ U.S. at ___, 116 S.Ct. at 1122.

The Supreme Court stated:

> In order to determine whether Congress has abrogated the States' sovereign immunity, we

> ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985); and second, whether Congress has acted "pursuant to a valid exercise of power." *Ibid.*

Seminole Tribe, ___ U.S. at ___, 116 S.Ct. at 1123.

The Supreme Court agreed that, with the enactment of § 2710(d)(7), Congress had in fact provided an "unmistakably clear" statement of its intent to abrogate. *Id.* However, the Court also concluded that the abrogation of sovereign immunity was not passed pursuant to a valid exercise of power under the Indian Commerce Clause. In making that determination, the Court stated:

> . . . Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-456, 96 S.Ct. 2666, 2669-2671, 49 L.Ed.2d 614 (1976). Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. . . . We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." . . . We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment

and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

In only one other case has congressional abrogation of the States' Eleventh Amendment immunity been upheld. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), a plurality of the Court found that the Interstate Commerce Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign immunity, stating that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages." . . . Justice White added the fifth vote necessary to the result in that case, but wrote separately in order to express that he "[did] not agree with much of [the plurality's] reasoning." . . .

In arguing that Congress through the Act abrogated the States' sovereign immunity, petitioner does not challenge the Eleventh Circuit's conclusion that the Act was passed pursuant to neither the Fourteenth Amendment nor the Interstate commerce Clause. Instead, accepting the lower court's conclusion that the Act was passed pursuant to Congress' power under the Indian Commerce Clause, petitioner now asks us to consider whether that clause grants congress the power to abrogate the States' sovereign immunity.

Id. at ___, 116 S.Ct. at 1124 (some citations omitted).

The Court then went on to review the singular *Union Gas* decision after noting that Article III federal courts are courts of limited jurisdiction, determined that *Union Gas* should be overruled. The Eleventh Amendment stands as

a limitation or restriction upon the exercise of judicial power by Article III federal courts and "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at ___-___, 116 S.Ct. at 1131-1132. However, it is made clear that it is undisputed that Congress has authority to abrogate Eleventh Amendment immunity in the context of statutes passed pursuant to the Fourteenth Amendment. *Id.* at ___, n. 15, 116 S.Ct. at 1131, n. 15. The *Seminole Tribe* decision gives Eleventh Amendment immunity a renewed vitality and has raised numerous questions that must be considered in the bankruptcy context.

The Court has not been able to discover any Tenth Circuit law that is precisely on point. A useful starting point, at least for Tenth Circuit precedent, is *Hensel v. Office of the Chief Administrative Hearing Officer,* 38 F.3d 505 (10th Cir.1994), which is not a bankruptcy case and pre-dates *Seminole Tribe.* In that case basic principles regarding Eleventh Amendment immunity are reiterated. A state cannot be sued by a citizen of the state without the state's consent. Where an entity, such as a university, is an arm of the state, that entity is also entitled to Eleventh Amendment immunity from suit, unless Congress has made its intention to make the state subject to suit unmistakably clear in the language of the statute or has waived federal sovereign immunity.

Evidence of congressional intent to abrogate sovereign immunity must be both " 'unequivocal and textual' . . . Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment." *Id.* at 508 (citations omitted). The Tenth Circuit then determined that, in

enacting the Immigration Reform and Control Act, 8 U.S.C. § 1101 et seq., there was no evidence that Congress had intended to abrogate the Eleventh Amendment and further, that there was no explicit and unambiguous language waiving immunity. The Tenth Circuit stated:

> Although the determination of what constitutes an arm of the state for certain purposes is based on state substantive law, the scope of Eleventh Amendment immunity is a matter of federal law. In keeping with the holding in *Puerto Rico Aqueduct*, this court has stated that "[i]f the Eleventh Amendment applies, it confers total immunity from suit, not merely a defense to liability." . . . States and state agencies "retain their immunity against all suits in federal court."

Id. at 508 (citations and quotations omitted).

The Tenth Circuit, in *Hurd v. Pittsburg State University*, 109 F.3d 1540 (10th Cir.1997), continued to acknowledge these principles, and considered *Seminole Tribe's* limitations on abrogation of Eleventh Amendment in the context of an ADEA suit. In response to arguments that the ADEA had been enacted by Congress pursuant to the Commerce Clause rather than the Fourteenth Amendment, the Tenth Circuit recognized that prior cases had held that the ADEA had been enacted pursuant to Congress' Commerce Clause powers. The circuit court also recognized, however, that it had never been decided in the Tenth Circuit whether, in enacting the ADEA, Congress had also acted pursuant to the Fourteenth Amendment. The circuit court stated:

> [N]othing in *Seminole Tribe* requires us to alter our implicit conclusion in *Hurd II* that the legislative history of the 1974 amendments to the ADEA reflects a purpose consistent with the Fourteenth Amendment and that Congress acted pursuant to its powers under the Fourteenth Amendment when it applied the ADEA to the states. Congress intended to and had authority to abrogate the states' Eleventh Amendment immunity from suit by the 1974 amendments to the ADEA.

109 F.3d 1540, 1544. Clearly, the Tenth Circuit has taken the position that Congress may properly exercise its powers pursuant to more than one constitutional provision and that some acts of Congress may enact legislation pursuant to multiple sources of constitutional authority.

Thus, in this era of *post-Seminole Tribe* law, what the Court must consider in this appeal is whether Congress could, in the exercise of power granted to it under the Bankruptcy Clause, waive states' sovereign immunity as to proceedings arising under specific sections of the Bankruptcy Code. The case law as it has developed reflects a split of authority, with some courts finding that Congress may validly abrogate states' sovereign immunity and other courts holding to the contrary. It also appears that of the courts finding that Congress does not have the power to abrogate Eleventh Amendment immunity under the bankruptcy clause of Article I of the Constitution, there is a renewed emphasis given to the subsequent provisions of § 106 relating to waiver of immunity. Additionally, courts have been required to consider whether Congress may have acted pursuant to the

Fourteenth Amendment when it enacted certain provisions abrogating states' sovereign immunity.

Section 106 of the Bankruptcy Code, entitled "Waiver of sovereign immunity," provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 933, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1304, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections of the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
>
> (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money

> judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.
>
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or non-bankruptcy law.
>
> (b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.
>
> (c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

The developing case law is uniform in agreement that, under the teachings of *Seminole Tribe*, although Congress has clearly evidenced in the language of § 106 its intent to abrogate sovereign immunity under the Eleventh Amendment, Congress does not have the power to abrogate Eleventh Amendment immunity solely pursuant to its Article I bankruptcy powers.

However, this finding does not end the inquiry, as the Supreme Court made clear that when Congress acts pursuant to its enforcement powers under the Fourteenth Amendment, § 5, to enforce federal rights, sovereign Eleventh Amendment immunity may not obtain and may be abrogated pursuant to that constitutional provision. It

is here that the case law begins to diverge and reach differing conclusions regarding congressional authority to abrogate sovereign immunity of the states.

Some of the cases conclude that Congress may abrogate sovereign immunity pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment. It is this line of cases that this Court has elected to follow in making its decision in the instant case. A decision rendered by Chief Bankruptcy Judge Mickey Dan Wilson, in *In re Southern Star Foods, Inc.*, 190 B.R. 419 (E.D.Okla.1995), held that Congress may abrogate a state's sovereign immunity under the Fourteenth Amendment. The decision pre-dates the *Seminole Tribe* decision, but continues to provide a useful analysis regarding this issue. In response to the state's argument that Congress lacked the power to abrogate Oklahoma's sovereign immunity, the bankruptcy court reviewed the doctrine in an historical context and against the policy considerations that undergird the evolution of the doctrine.

The analysis began with the original conceptual notion that " 'the King can do no wrong.' " *Mather v. Oklahoma Employment Sec. Comm'n (In re Southern Star Foods)*, 190 B.R. at 423. That court then went on to discuss the United States Supreme Court's decision in *Chisholm v. Georgia*, 2 Dall. 419, 2 U.S. 419, 1 L.Ed. 440 (1793), in which the Court held that the State of Georgia could be sued in federal court by a citizen of South Carolina, notwithstanding Georgia's claim of sovereign immunity. *Id.* Continuing:

> The narrow ruling of *Chisholm v. Georgia*, that a State could be sued in Federal court by a citizen of another State, was overruled by the

Eleventh Amendment. In effect, an "inconvenien[ce] in practice" of the sort noted by Justice Cushing was remedied, as Justice Cushing recommended, by "a regular mode . . . for amendment." The Eleventh Amendment does not purport to overrule the principle on which *Chisholm v. Georgia* was based, i.e., sovereignty of the people, embodied in their National government, and for national purposes superior to the sovereignty of the States. In 1861, a minority of disgruntled States attempted to overrule *Chisholm v. Georgia's* basic principles with armed force. Their argument was met with a stronger one. In 1868, the winning argument of the Union was formalized in the Fourteenth Amendment to the Constitution. That Amendment reads in pertinent part as follows:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

This Amendment is usually thought of as a response to slavery; but it can also be seen as a virtual codification of the basic principle (though not the narrow ruling) of *Chisholm v. Georgia*. The Fourteenth Amendment provides that citizens of the United States may rely upon

their national Congress to enforce their national rights against the States.

In short, there has been, in Hamilton's words, "a surrender of this immunity in the [Constitution]." According to the Supreme Court in *Chisholm v. Georgia*, such "surrender occurred with the adoption of the Constitution in 1789; but if there be any doubt on that score, it certainly occurred with the ratification of the Fourteenth Amendment in 1868."

In 1890, a different U.S. Supreme Court used the Eleventh Amendment as a vehicle for reimporting the doctrine of State sovereign immunity into our Constitutional law, *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Since then, *Hans v. Louisiana* has been limited, and the Fourteenth Amendment remembered and re-enforced to a considerable extent, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). In 1987, *Hans v. Louisiana* escaped overruling by an evenly divided Court, *see Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). Since then, our existing jurisprudence regarding the Eleventh Amendment and State so-called sovereign immunity has been criticized from left, right, and center- . . . . But it remains the rule that, pursuant to Section 5 of the Fourteenth Amendment, Congress may abrogate the States' so-called sovereign immunity, notwithstanding the Eleventh

Amendment, if Congress does so in clear and unequivocal statutory language. . . .

In its original version, 11 U.S.C. § 106 was held insufficient to abrogate sovereign immunity. . . . In 1994, the statute was amended. The language used by Congress in the amended, presently effective version of 11 U.S.C. § 106(a) is as clear and unequivocal an abrogation of State sovereign immunity, as against actions such as this one under 11 U.S.C. §§ 542, 549, 550, 724, as could possibly be expressed in words.

There remains the question whether, in enacting 11 U.S.C. § 106(a) with its clear and unequivocal abrogation of State sovereign immunity, Congress acted pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment. It is proposed by some that the enforcement powers of the Fourteenth Amendment do not apply "to antecedent provisions of the Constitution," *Pennsylvania v. Union Gas Co.*, 491 U.S. p. 42, 109 S.Ct. p. 2303, 105 L.Ed.2d p. 34 (in concurring/dissenting opinion by Justice Scalia), such as the Commerce Clause, *id.*, or Article I's bankruptcy clause, *Hoffman v. Connecticut Income Dept.*, 492 U.S. p. 105, 109 S.Ct. p. 2825, 106 L.Ed.2d p. 86 (concurring opinion of Justice Scalia).

This could be true only if such "antecedent powers" did not implicate "the privileges or immunities of citizens of the United States . . . life, liberty or property . . . due process of law . . . [or] the equal protections of the laws" guaranteed by the Fourteenth Amendment. But Congress' exercise of its basic national legislative powers under any of the provisions of Article I will usually (if not invariably) implicate

"the privileges or immunities of citizens of the United States . . . life, liberty or property . . . due process of law . . . [or] the equal protections of the laws." A State cannot limit the exercise by a citizen of the United States of a right conferred by a valid act of Congress. . . . Article I of the Constitution gives the national government power to legislate on the subject of bankruptcy; and the national government has done so, by creating the complex of privileges and immunities, rights and liabilities, found in the Bankruptcy Code. The Bankruptcy Code is intended to provide all American citizens with the following: the privilege of efficient liquidation or other use and ratable distribution of a debtor's assets, or (to put it another way) with immunity from the inefficient liquidation or use and inequitable distribution of a debtor's assets which may obtain under State laws; the privilege of discharge, or (to put it another way) with immunity from oppressive debt collection which may obtain under State laws; liberty from economic bondage, and protection against undue loss of value of property in exigent financial circumstances; and fair and efficient determination of all of the above, according to the process due in a national court of equitable jurisdiction, without regard to persons or to any special privileges save those considered by Congress to be justified as a matter of policy.

Although such laws are enacted "pursuant to Article I," they are enforceable "through the Fourteenth Amendment." To attempt to separate the power of national enactment under Article I from the power of national enforcement under the Fourteenth Amendment is to mince the Constitution – to take what should be considered as

> a working whole, and dismember it into a scatter of lifeless parts. This Court declines to do so. It is apparent to this Court that 11 U.S.C. § 106(a), even though enacted "pursuant to Article I," is also a valid exercise of Congressional enforcement power, including the power to abrogate State Sovereign immunity, "through the Fourteenth Amendment."

In Re Southern Star Foods, 190 B.R. at 425-426 (many citations omitted).

After the *In re Southern Star Foods* case out of Oklahoma was decided, the Supreme Court rendered its decision in *Seminole Tribe*. However, the Georgia bankruptcy court, in *Headrick v. State of Georgia (In re Headrick)*, 200 B.R. 963 (Bankr.S.D.Ga.1996), revisited the *In Re Southern Star Foods* decision and elected to follow its rationale. In *Headrick*, the State of Georgia had filed a proof of claim (on April 10, 1995) for income taxes after the debtors filed for Chapter 13 relief (on December 28, 1994). On October 24, 1995, Georgia issued an "Official Assessment and Demand for Payment" against the debtors and on December 21, 1995 issued a "Collection Notice" containing demands for payment and threats of collection by levy, garnishment or attachment, against the debtors. Debtors then instituted the action against Georgia alleging that the collection attempts violated the § 362 automatic stay. In response to the State's argument that it was entitled to Eleventh Amendment immunity, the Georgia bankruptcy court stated the following:

> By its express terms, the Eleventh Amendment to the United States Constitution immunizes a State from suit in the federal courts by a non-resident of that State. Despite this narrow

language, the Supreme Court has consistently interpreted the Eleventh Amendment to immunize States from suits by any individual, whether a resident of that State or of another State. . . . This immunity restricts Congress from creating rights of action against States in federal court under Congress' Article I powers unless the State consents to suit. *Seminole Tribe* . . . (Congress cannot abrogate a State's immunity from suit by creating a right of action against the State under the Indian Commerce Clause.)

The Supreme Court established a two prong test to determine whether Congress may abrogate a State's immunity: " . . . first, whether Congress has unequivocally expressed its intent to abrogate the immunity, and second, whether Congress has acted pursuant to a valid exercise of power." (citations omitted) . . . In *Seminole Tribe*, the Supreme Court acknowledged that Congress had unequivocally acted to abrogate State immunity from suit under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., but ruled that the Indian Commerce Clause of the Constitution . . . did not authorize Congress to abrogate this immunity. In determining that the Indian Commerce Clause did not authorize Congress to subject a State to suit in federal court by an individual, the Court reversed the line of cases holding that the Commerce Clause authorizes Congress to act so. . . .

Bankruptcy Code title 11 § 106 unequivocally expresses Congressional intent to abrogate the States' sovereign immunity by subjecting them to damage awards for violations of the automatic stay. *See, In Re Merchants Grain, Inc.*, 59 F.3d 630 (7th Cir.1995) vacated and remanded

___ U.S. ___, 116 S.Ct. 1411, 134 L.Ed.2d 537, (Congress' 1994 revision of § 106 unequivocally evidenced its intent to abrogate the States' immunity from suit). The question is whether Congress has authority to abrogate this immunity under the Bankruptcy Clause of the United States Constitution (U.S. Const.Art. I, § 8, Cl.4). Answered yes by the Seventh Circuit in *Merchants Grain*, but remanded by the Supreme Court for reconsideration in light of *Seminole Tribe*. . . .

Under the rationale articulated in *Seminole Tribe*, Congress is not authorized to abrogate the States' immunity under the Bankruptcy Clause of the United States Constitution. . . . However, in *Seminole Tribe*, the Supreme Court recognized and reaffirmed Congress' ability to abrogate a State's immunity under the express language of the Fourteenth Amendment. . . . The Supreme Court did not address whether the Fourteenth Amendment authorized Congress to enforce the Indian Gaming Regulatory Act against the States because the petitioner abandoned this issue after the Eleventh Circuit Court of Appeals rejected its argument that the Indian Gaming Regulatory Act created a liberty and property interest subject to Congress' protection under the Fourteenth Amendment.

The Fourteenth Amendment expressly gives Congress the authority to pass laws to prevent the States from abridging citizens' privileges and immunities. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

> "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law." . . .
>
> . . . Article I empowers Congress to grant debtors the privileges and immunities of the Bankruptcy Code, and the Fourteenth Amendment gives Congress the right to enforce those privileges and immunities by creating private rights of action against the States In § 106, Congress unequivocally expressed its intent to abrogate Georgia's immunity, and this abrogation was enacted by a valid exercise of power under the Fourteenth Amendment. *See, Mather v. Oklahoma Employment Sec. Comm'n (In re Southern Star Foods, Inc.)*, 190 B.R. 419 (Bankr.E.D.Okl.1995) (Article I gives Congress the power to legislate on the subject of bankruptcy, and the Fourteenth Amendment allowed debtors to enforce the provisions of the Bankruptcy Code in federal court notwithstanding the States' Eleventh Amendment immunity.)

Headrick, 200 B.R. at 965-966 (most citations omitted). The *Headrick* court then went on to also find alternatively that the State of Georgia had waived its immunity by filing a proof of claim in the debtor's estate.

Georgia then sought a reconsideration of the *Headrick* decision. As a result, another opinion discussing Eleventh

Amendment immunity issued out of the Georgia bankruptcy Court. *Headrick v. State of Georgia (In re Headrick)*, 203 B.R. 805 (Bankr.S.D.Ga.1996). The bankruptcy persisted in its prior determination that the Fourteenth Amendment granted to Congress the authority to subject Georgia to causes of action filed by individuals to enforce the provisions of and recover damages for violation of the automatic stay. *In re Headrick*, 203 B.R. at 807.

That court again discussed the two prong test established by the Supreme Court for determining whether Congress may abrogate Eleventh Amendment immunity from suit in federal court. Of significance is the discussion whether Congress has the authority to abrogate Eleventh Amendment immunity under the Constitution of the United States. The bankruptcy court stated:

> In my previous Order, I found that the protections of the Bankruptcy Code are Congressional expression of specific privileges and immunities incident to federal citizenship, and that Congress may therefore enact legislation enforceable against the States in federal court under the Fourteenth Amendment of the United States Constitution. [footnote omitted]. *Headrick v. Georgia (In re Headrick)*, 200 B.R. 963 (Bankr.S.D.Ga.1996), citing, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (the Fourteenth Amendment specifically authorizes Congress to abrogate the States' Eleventh Amendment immunity.) In seeking reconsideration of this order, Georgia presents two unpersuasive arguments against this holding: 1) that Congress did not expressly enact the Bankruptcy Code pursuant to the Fourteenth Amendment, thereby precluding its application

to the Bankruptcy Reform Act of 1994; and 2) that such a holding is contrary to the Supreme Court's decision in *Seminole Tribe*.

The first requirement for a valid abrogation of the States' immunity places upon Congress the burden of unequivocally expressing its intent to abrogate immunity in clear and unambiguous language. This first requirement does not require Congress to specify a constitutional provision as its basis. The second requirement, whether Congress has authority to abrogate, is a determination made by a court exercising the judicial power of the United States under Article III of the Constitution, not Congress nor this court. . . .

Georgia also argues that my holding is contrary to the reasoning articulated in *Seminole Tribe*, and that failing to reverse the decision would be a de facto finding that Congress has authority to abrogate the State's immunity under any federal statute. The *Seminole Tribe* decision recognized and reaffirmed Congress' ability to abrogate a States' immunity under the Fourteenth Amendment. . . . The Supreme Court did not analyze the constitutionality of the Indian Gaming Regulations Act under the Fourteenth Amendment because the petitioner abandoned this argument after the Eleventh Circuit Court of Appeals rejected its contention that the Indian Gaming Regulations Act created a liberty and property interest subject to Congress' protection under the Fourteenth Amendment. . . . *Seminole Tribe* therefore did not address whether Congress has authority under the Fourteenth Amendment to enforce a Debtor's right, as a citizen of the United States, to monetary relief

> for State actions which violate the automatic stay provisions of section 362 of Title 11, the Bankruptcy Code. Furthermore, the rationale supporting Congress' abrogation of Georgia's immunity in this case does not, as Georgia asserts, allow Congress to abrogate the States' immunity under all federal statutes. The analysis here is limited to the bankruptcy clause of the Constitution. The Constitution Article I Sec. 8 Clause 4 provides that Congress shall have the power: " . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." In the exercise of this power Congress has enacted 11 U.S.C. § 362 and, pursuant to 11 U.S.C. § 106, has unequivocally subjected the States to the provisions of § 362, including subsection (h). The privileges and immunities provided for under the uniform laws of bankruptcy applicable throughout the United States are incidences of federal citizenship against which, under the Fourteenth Amendment, no State may make or enforce any law abridging same. Additionally, the Fourteenth Amendment empowers Congress to enforce the provisions of the Fourteenth Amendment protecting the privileges and immunity of federal citizenship by appropriate legislation. Georgia may not therefore attempt to enforce its revenue collections statutes in defiance of the § 362 stay and Congress, in a valid exercise of its power of enforcement under the Fourteenth Amendment, can abrogate Georgia's sovereign immunity against individual suits in federal court for damages arising from its breach of the § 362(a) stay brought pursuant to § 362(h).

In re Headrick, 203 B.R. at 808-809 (most citations omitted).

This analysis was again reiterated in a decision out of the same bankruptcy court, *Burke v. State of Georgia (In re Burke)*, 203 B.R. 493 (Bankr.S.D.Ga.1996). The decision incorporates the reasoning of the *Headrick* opinion, and upheld the judgment that Georgia was not immune from suits for violations of the discharge injunction. *Id.*

The *Headrick* and *In re Southern Star Foods* determinations that Congress could, pursuant to the Fourteenth Amendment, abrogate the sovereign immunity of the States, have been cited in cases from other districts that either decline to follow that reasoning or did not consider the Fourteenth Amendment abrogation issue because it was not before the particular court for consideration. *See e.g., Norristown v. Commonwealth of Pennsylvania, Department of Public Welfare (In re Sacred Heart Hospital of Norristown)*, 204 B.R. 132 (E.D.Pa.1997) (deciding Congress could not, pursuant to Article I abrogate sovereign immunity, but not considering whether Congress had power to do so pursuant to Fourteenth Amendment, citing *Headrick*); *Sparkman v. State of Florida Department of Revenue (In re York-Hannover Developments, Inc.)*, 201 B.R. 137 (Bankr.E.D.N.C.1996) (no abrogation under Article I, citing *In re Southern Star Foods* and *Headrick* for proposition that Congress was authorized to enact § 106(a) under § 5 of the Fourteenth Amendment, but stating "[h]owever, the issue of Congress' authority to abrogate States' sovereign immunity under § 5 of the Fourteenth Amendment is not before the court in this proceeding and in light of *Seminole*, the court concludes that Congress did not act within its constitutional authority when enacting § 106(a)."); *Tri-City Turf Club, Inc. v. Kentucky Racing Commission (In re Tri-City Turf Club, Inc.)*, 203 B.R. 617

(Bankr.E.D.Ky.1996) (citing and criticizing *Headrick*, and stating "[w]hile proper enactments pursuant to the provisions of the Fourteenth Amendment of the Constitution may not fall under *Seminole Tribe's* axe, there must be a ' . . . sufficiently strong logical connection between the aim of the act . . . and central, obvious Fourteenth Amendment concerns.' . . . The Court can find no hint that Congress had in its collective mind Fourteenth Amendment concerns when it enacted Section 106(a) of the Bankruptcy Code."); *In re NVR L.P.*, 206 B.R. 831 (Bankr.E.D.Va.1997) (rejecting entirely the notion that Congress may, pursuant to § 5 of the Fourteenth Amendment, enact legislation designed to enforce Article I bankruptcy legislation); *Ossen v. State of Connecticut, Department of Social Services (In re Charter Oak Associates)*, 203 B.R. 17 (Bankr.D.Conn.1996) (Congress without authority to abrogate sovereign immunity under Article I bankruptcy provisions of the Constitution; not considering at all whether abrogation may be accomplished pursuant to the Fourteenth Amendment); *Koehler v. Iowa College Student Aid Commission (In re Koehler)*, 204 B.R. 210 (Bankr.D.Minn.1997) (no authority to abrogate sovereign immunity under Article I; following *Seminole Tribe* and noting *Headrick* and *In re Star Foods* decisions as exceptional; finding state had voluntarily waived immunity through its affirmative conduct); *AER-Aerotron, Incorporated v. Texas Department of Transportation*, 104 F.3d 677 (4th Cir.1997) (analyzing immunity only in terms of Congress' Article I enactments, Congress lacks power to affect Eleventh Amendment immunity in the exercise of its Article I powers; noting *Seminole Tribe* affirmed Congress' power to affect state immunity in federal court

through the Fourteenth Amendment; applying constitutional doctrine of Eleventh Amendment waiver); *Light v. State Bar of California (In re Light)*, 87 F.3d 1320 (Table) Unpublished Disposition; Text at 1996 WL 341112 (9th Cir.1996) ("Congress's power to abrogate the States' sovereign immunity is now limited to congressional acts pursuant to § 5 of the Fourteenth Amendment" at *2; following *Seminole Tribe* to find damage and civil contempt claims against the State Bar to be barred by the Eleventh Amendment; unclear whether the circuit court considered whether § 106 of the Bankruptcy Code enacted pursuant to Congress' enforcement powers under the Fourteenth Amendment); *Schulman v. California State Water Resources Control Board (In re Lazar)*, 200 B.R. 358 (Bankr.C.D.Cal.1996) (*Seminole Tribe* holding that Eleventh Amendment prevents Congress, acting pursuant to Article I powers, from subjecting unconsenting states to suit by private parties in federal court discussed; stating "trustees and debtors in possession may sue states and state agencies in state court . . . with no hindrance from the Eleventh Amendment," relying on *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), as reaffirmed in *Seminole*; considering state consent to suit through waiver by filing claim and making general appearance in support of its position as a secured creditor; and noting that Fourteenth Amendment fundamentally altered the balance of state and federal power, which can also be a means of abrogating Eleventh Amendment immunity, but "neither party before the Court contended that the Fourteenth Amendment provides the grounds for this Court's jurisdiction in this matter, and the Court perceives no such ground on its own" at p. 382).

It is evident to this Court that the issues presented in this case will ultimately require an analysis and disposition by a higher court. It is quite likely the Supreme Court will be called upon to clarify its holding in *Seminole Tribe*, insofar as it left open the possibility that Congress could abrogate Eleventh Amendment immunity by acting pursuant to the Fourteenth Amendment in these circumstances. Until there is definitive guidance from either the Tenth Circuit or the United States Supreme Court, this Court has elected to follow the analysis employed by the bankruptcy courts in *In re Southern Star Foods*, the only decision out of this circuit at any level discussing these issues that this Court was able to discover, and *Headrick*, as applied against the Tenth Circuit's position recognizing that congressional actions may be enacted pursuant to more than one constitutional source of authority. The Court now finds that Congress has the authority to abrogate States' sovereign immunity from suit by individuals for violating provisions of the Bankruptcy Code, pursuant to the Fourteenth Amendment.

2. Waiver

Even if this Court's determination that the State is not immune from suit in this case is in error, the Court finds that the State of Wyoming has waived immunity by filing proofs of claim against the debtors. This determination, however, requires an analysis of the scope of the State's waiver of immunity. Section 106(b) of the Bankruptcy Code provides that a "governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the

estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." *Ossen v. State of Connecticut, Department of Social Services (In re Charter Oak)*, 203 B.R. at 21. The *Charter Oak* court stated that these subsections of § 106 do not conflict with *Seminole Tribe*, and concluded they are enforceable against states filing proofs of claim. Many of the cases that have been decided in the wake of *Seminole Tribe* have concluded that the state can waive its immunity by filing a proof of claim in a bankruptcy case, as set forth in 11 U.S.C. § 106(b). A state's consent to suit may arise by varied conduct. *Schulman v. California State Water Resources Control Board (In re Lazar)*, 200 B.R. at 377. Waivers may arise from the filing of a claim in a bankruptcy case, or making a general appearance in a case, as well as in a state statute or constitutional provision. *Id.* The scope of a waiver will depend on the nature of the conduct giving rise to it. *Id.*

> The filing of a claim in a bankruptcy case constitutes a limited waiver of sovereign immunity by a state. When a state file a claim, it waives its sovereign immunity with respect to any claim against it by the debtor arising from the same transaction or occurrence.

Id. at 377-378. *See also Ossen v. State of Connecticut, Department of Social Services (In re Charter Oak)*, 203 B.R. at 21-22; *Koehler v. Iowa College Student Aid Commission (In re Koehler)*, 204 B.R. at 217-220; *Burke v. State of Georgia (In re Burke)*, 203 B.R. at 497-498; *Sacred Heart Hospital of Norristown v. Commonwealth of Pennsylvania, Department of Public Welfare (In re Sacred Heart Hospital of Norristown)*, 204 B.R. at 140-142 (noting especially that the waiver of § 106(b) is

a limited waiver of immunity); *Headrick v. State of Georgia (In re Headrick)*, 203 B.R. at 809-810 and 200 B.R. at 967-969; *In re Martinez*, 196 B.P.. 225, 229-230 (D.Puerto Rico 1996).

In this case, the State of Wyoming has argued that a waiver arising from the proofs of claim filed by the Workers' Compensation and the Wyoming Department of Employment cannot serve to waive immunity for another agency, the Department of Transportation. The debtors have asserted by a waiver by one agency waives immunity for all agencies of the state.

As noted in *Schulman v. California State Water Resources Control Board (In re Lazar)*, 200 B.R. at 378, there is a split of authority on whether the filing of a claim by one state agency constitutes a waiver of Eleventh Amendment sovereign immunity for all other agencies. *In re Lazar, id.* (citing cases). That court did not agree with the broad view purporting to waive all state Eleventh Amendment immunity when one agency files a claim. That court stated:

> The broad view fails to give sufficient weight, in the Court's view, to the "transaction or occurrence" language in § 106(b). Accordingly the Court must determine whether the trustee's claim against the Fund in this case has a logical relationship to the claim that the State of California has filed for unpaid taxes, including the tax contributions to the [California Underground Storage Tank Cleanup] Fund.

Id. at 378. In that case a claim was filed by the California State Board of Equalization (SBE) and the state controller for more than $44 million in unpaid taxes. An unspecified

portion of that amount was for taxes payable to the Fund. No claim was filed by the State Water Resources Control Board (SWRCB). In the proceedings before the bankruptcy court, SWRCB argued that 1) the claims filed by the SDB and state controller were unrelated and the waiver that obtained by the filing of those claims did not extend to SWRCB, 2) that the waiver was not voluntary because the state was compelled to file a claim to participate in the distribution of the bankruptcy estate, and 3) § 106 as amended was unconstitutional in view of *Seminole Tribe*. The bankruptcy court rejected those arguments.

The court considered that the SBE had responsibility for collecting a number of kinds of taxes, including gasoline taxes collected to support the Fund. Part of the claims filed by SBE were explicitly designated as taxes owing under the Underground Storage Tank Maintenance Fee Law. The court also noted that the claims were not "de minimis" and held that the "statutory waiver of sovereign immunity resulting from the filing of a claim in a bankruptcy case was well known to the State of California when it filed its claims." *Id.*

That court also rejected the argument that the filing of a claim was not a voluntary waiver. This argument was rejected by the bankruptcy court, noting that the state, as a creditor, has a choice. It can ignore the bankruptcy case or elect to file a claim in order to participate in the fruits of the bankruptcy process. *Id.* at 380.

> The fact that a particular creditor finds these choices unattractive does not convert the choice into an involuntary decision: If this were so, many of the choices that people make in many

> different contexts of life would be "involuntary", and some people could live virtually their entire lives without making any voluntary choices at all. The Court declines to adopt such a cramped view of the voluntary character of human choices.

Id.[1]

The *Charter Oak* court noted that the waiver of immunity is a limited one. That court determined that the State is a single entity for these purposes and that all the publicly acting agencies of the state were a single governmental unit for purposes of Eleventh Amendment immunity under § 106(b). *In re Charter Oak*, 203 B.R. at 22. However, that court then went on to determine that the claim filed by the state and the debtor's claim did not arise out of the same transaction so as to constitute a waiver under § 106(b). *Id.*

> As noted, § 106(b) provides that the proof of claim is a waiver to a claim against such governmental unit that arose out of the same transaction or occurrence. This language tracks the language of Fed.R.Civ.P. 13(a), which defines a

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[1] This analysis collides with that of the bankruptcy court in *In re NVR L.P.*, 206 B.R. 831, 839 (Bankr.E.D.Va.1997), which held that only a state may waive its sovereign immunity and that Congress could not, through § 106(b) dictate the circumstances in which states would "waive" their Eleventh Amendment immunity, and declining to follow the opinion in *Ossen v. Connecticut Department of Social Services (In re Charter Oak)*. The NVR court found therefore there had been no waiver of immunity by the States of Pennsylvania and Maryland, as well as finding that Congress was without authority to abrogate sovereign immunity under Article I or the Fourteenth Amendment.

> compulsory counterclaim as a claim which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."
>
> In defining the bounds of a compulsory counterclaim, the Second Circuit "generally has taken a broad view, not requiring an absolute identity of factual backgrounds . . . but only a logical relationship between them. . . . This approach looks to the logical relationship between the claim and the counterclaim and attempts to determine whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *United States v. Aquavella*, 615 F.2d 12, 22 (2d Cir.1979) (internal citations and quotation marks omitted).
>
> Applying this standard to the stipulation of facts submitted by the parties, the court concludes that the defendant's claim for use taxes due from the debtor is not so logically connected with the plaintiff's claim for reimbursement of services rendered the defendant that both issues would have to be resolved in one lawsuit.

Id. at 23. *Accord Koehler v. Iowa College Student Aid Commission (In re Koehler)*, 204 B.R. at 217-222 (discussing the "logical relationship" test employed by the Eighth Circuit, and concluding that the debtor's claim for damages for violation of the discharge injunction and violations of the automatic stay when the ICSAC attempted to collect loans, for which no proof of claim was filed but which was the subject of a counterclaim against the debtor in

the adversary proceedings, arose out of the same transaction and were logically related so as to satisfy the waiver of 106(b)).

Thus, given that § 106(b)'s waiver of immunity is limited, this Court believes that the critical determination will not be whether the filing of a proof of claim by one agency waives for all state agencies, but whether the activities of the state agencies are so logically related that they may be considered to have arisen out of the same transaction or occurrence, within the meaning of 11 U.S.C. § 106(b). This requires the Court to examine and consider the facts that are in the record on this appeal.

Here, it is clear that "but-for" the debtor's bankruptcy and the claims of the State for unpaid taxes by Centerline Flagging, the DOT would not have taken steps to decertify the debtor's DBE status. There is a logical relation between the claims. The taxing entities of the State of Wyoming filed proof of claims. To the extent that the claims involving the DOT arise out of the same transaction or occurrence, the Court concludes that the State of Wyoming has waived its Eleventh Amendment immunity, acknowledging that this is a limited waiver of sovereign immunity by the State of Wyoming. Furthermore, the damages caused by the governmental unit's violation of the bankruptcy stay may be offset against the proofs of claim filed by the State of Wyoming for unpaid taxes. 11 U.S.C. § 106(c).

The Court acknowledges that the contours of Eleventh Amendment immunity have become somewhat obscured, after the Supreme Court's *Seminole Tribe* decision. However, the Court believes the instant decision

does not violate public policy of the State of Wyoming and serves to facilitate the Bankruptcy Code's goal of a "fresh start" for financially troubled debtors. This is particularly true in the Chapter 13 context where the debtor's efforts to rehabilitate financially may depend upon the continued ability to generate income sufficient to pay allowed claims under a confirmed Chapter 13 plan. Here, the State seeks to have it both ways: it seeks immunity for all issues arising out of its attempt to decertify the debtor's DBE status under applicable law governing federal highway programs, yet it seeks to waive immunity so as to assert claims and participate in the bankruptcy Chapter 13 reorganization process seeking to collect the unpaid taxes that initially served as the impetus for decertifying the debtor. This belies the "logical relationship" test and the Court finds that the State of Wyoming has waived its immunity with respect to these issues and claims.

Accordingly, and for the foregoing reasons, it is therefore

ORDERED that the debtors' Motion to Dismiss shall be **GRANTED**, to the extent that it seeks a determination that the State has not timely appealed the bankruptcy court's September 20, 1995 "Order on Motion for Contempt Citation," and **DENIED**, to the extent that it seeks a dismissal of all issues relating to the bankruptcy court's July 19, 1996 "Order Approving Payment of Fees and Costs." It is further

ORDERED that the bankruptcy court's July 19, 1996 "Order Approving Payment of Fees and Costs" shall be, and is, **AFFIRMED**.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING

in re	)	
BEVERLY ANN STRAIGHT and MILTON L. STRAIGHT,	)	Case No. 95-10007 Chapter 13
Debtors.	)	(Filed July 11, 1996)

ORDER APPROVING PAYMENT OF FEES AND COSTS

THIS MATTER having come before the court on the Amended Statement of Fees and Costs filed by Stephen R. Winship, pursuant to this Court's Order on Motion for Contempt Citation entered September 20, 1995, and the Court being fully advised, and no objections having been filed, and good cause being shown therefor;

NOW, THEREFORE, it is hereby ORDERED that the State of Wyoming shall pay Stephen R. Winship the allowed fees and costs in the amount of $1,949.94 for its violation of the automatic stay.

DATED this 11 day of July, 1996.

BY THE COURT:

Original Signed by
Peter J. McNiff

United States Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING

in re	)	
BEVERLY A. STRAIGHT, d/b/a Centerline Traffic Control & Flagging, and MILTON L. STRAIGHT, a/k/a Milton Lloyd Straight, Milton Straight, and Mickie Straight,	)	Case No. 95-10007 CHAPTER 13 (Filed Sept. 20, 1995)
Debtors.	)	

ORDER ON MOTION FOR CONTEMPT CITATION

THIS MATTER is before the court on the debtors' Motion for a Contempt Citation alleging that the Department of Transportation of the State of Wyoming (DOT) violated the automatic stay and the anti-discrimination provisions of the United States Bankruptcy Code.

On the debtors' motion this court issued an Order to Show Cause, to which the DOT did not respond prior to the hearing. On August 15, 1995, the court held a hearing at which the DOT did not appear. However, later on August 15, the DOT, through its counsel, filed a responsive pleading to the motion and order. Now the court, having considered the evidence and testimony, and having heard the arguments of the debtors' counsel, Stephen R. Winship, FINDS and CONCLUDES as follows:

1. On January 13, 1995, Beverly Ann Straight and Milton L. Straight filed their voluntary chapter 13 petition. Mrs. Straight is engaged in a highway flagging

business called Centerline Traffic Control and Flagging (Centerline). The DOT received notice of the bankruptcy filing.

2. On February 15, 1995, the DOT issued Mrs. Straight's business a Disadvantaged Business Enterprise (DBE) certification. This was a recertification that entitled Mrs. Straight to bid for subcontracting jobs on state highway projects which are federally funded, and for which the prime contractor obtains financial incentives by hiring the DBE certified business owner. The federal certification process is conducted through the DOT, which also lets the construction bids.

3. In a March 10, 1995 letter, a DOT officer stated his intention to decertify Centerline as a DBE because Mrs. Straight had filed a chapter 13 bankruptcy and "lost the ability to control (her) business; that control now lies in the hands of the Bankruptcy Court and the Bankruptcy Trustee." This erroneous statement of the law by the DOT officer demonstrates a complete misunderstanding of the chapter 13 process.

4. On March 28, 1995, despite communications from Mr. Winship, the DOT did decertify Centerline. The reason given at that time was that Mrs. Straight was not operating an independent business because she did not "possess the financial and bonding resources necessary to operate the business in its field of work." However, Mrs. Straight did provide evidence of bonding through Western States Bonding. This fact was acknowledged, but rejected as determinative, by the DOT officer in a May 15, 1995 letter.

5. In the meantime, and due to the loss of the DBE status, Mrs. Straight lost at least two (2) separate construction contracts for summer, 1995 work.

6. The DOT is a governmental unit. The moment the DOT officer sent the March 10, 1995 letter, the DOT was in clear violation of the anti-discrimination provisions of 11 U.S.C. § 525(a). *In re Exquisito Services, Inc.*, 823 F.2d 151, 155 (5th Cir. 1987). Section 525 prohibits a governmental unit from revoking or suspending a license, permit, or similar grant of a person solely because that person is a debtor under the Bankruptcy Code. And following Mr. Winship's letter of March 14, 1995, specifically informing the DOT of § 525, the DOT proceeded to decertify Centerline anyway.

7. The debtor's testimony, the tenor of the DOT letters, and the apparent intransigence of the DOT officer convince the court that the subsequently stated reasons for revoking the DBE certificate were merely pretext and an attempt to excuse actions clearly wrongful under § 525. The DOT has failed to provide any non-bankruptcy related justification for its action, particularly after Mrs. Straight provided a surety bond and additional financial information as requested.

8. The DOT officer's actions were also a violation of the automatic stay imposed by § 362(a)(3). That section prohibits any act to exercise control over property of the estate without first obtaining appropriate relief from the bankruptcy court. The DBE certification is a financial interest which provides a pecuniary advantage to the debtor and as such, is property of the bankruptcy estate. 11 U.S.C. § 541 (a)(1); *In re Metro Transp. Co.*, 64 B.R. 968,

973 (Bankr. E.D. Pa. 1986) (PUC taxi cab certificates to operate are part of debtor's estate); *In re St. Louis South Park II, Inc.*, 111 B.R. 260 (Bankr. W.D. Mo. 1990) (nursing home certificate of need protected by automatic stay).

9. There is an exception for certain governmental action, which is found in § 362(b)(4). That section excepts actions by a governmental unit to enforce that entity's police or regulatory power. In the Tenth Circuit, the two (2) tests used to determine whether the § 362(b)(4) exception applies are found in *Eddleman v. U. S. Dept. of Labor*, 923 F.2d 782, 790-791 (10th Cir. 1991). Under the "pecuniary purpose test," the DOT action might be excepted because the state government has no pecuniary interest in Centerline's DBE status.

10. The "public policy" test distinguishes between governmental proceedings aimed at effectuating public policy and those aimed at adjudicating private rights. *Id.* In the case of *In re Medicare Ambulance Co., Inc.*, 166 B.R. 918 (Bankr. N.D. Cal. 1994), the court elaborated on the public policy test, stressing the distinctions. A court should determine whether the action is an attempt to prevent future violations of the law, which falls under the public policy exception, or an attempt to determine the liability of private parties. In a thorough discussion, that court held that the suspension of Medicate payments by the United States Department of Health and Human Services was a violation of the automatic stay.

11. In this case, the DOT was not promoting the public safety when it interfered with Beverly Ann Straight's ability to continue her business. One of the stated reasons for revoking the DBE status was that the

debtors owed accrued payroll taxes in excess of $90,000. Clearly, the DOT action was based on pecuniary considerations, rather than public policy matters. *Bd. of County Comm'rs of County of Archuleta v. Fairfield Communities, Inc.*, 122 B.R. 128 (D. Colo. 1990). This action was willful and is precisely the type of action that the automatic stay is intended to prevent. *In re Christensen*, 167 B.R. 213, 217 (D. Or. 1994); *In re Kuck*, 116 B.R. 821 (Bankr. S.D. Ala. 1990).

12. The law is well-settled that a violation of the automatic stay is void *ab initio*. *In re Calder*, 907 F.2d 953, 956 (10th Cir. 1990). This court has the power to reinstate the debtor's DBE status or declare it unaffected by the decertification. *In re Exquisito Services, Inc.*, 823 F.2d at 155.

13. Under § 105 and § 362(h), the court also has the authority to award costs and attorney fees to the debtor for willful violations of the automatic stay. Compensatory damages are also contemplated and are not barred by assertions of Eleventh Amendment sovereign immunity. 11 U.S.C. § 106(a)(3)(1994).

It is, therefore, ORDERED, ADJUDGED, AND DECREED that the Department of Transportation for the State of Wyoming violated the anti-discrimination provisions of 11 U.S.C. § 525 when it notified Beverly Ann Straight that Centerline's DBE certification was to be revoked, and when the DBE status was later revoked; and, it is further

ORDERED that the Department of Transportation for the State of Wyoming violated the automatic stay of 11

U.S.C. § 362(a) when it revoked and then refused to reinstate the DBE certification; and, it is further

ORDERED that the revocation is void and that Centerline's DBE certification shall be immediately reinstated; and, it is further

ORDERED that Beverly Ann Straight is entitled to her attorney fees and costs incurred in prosecuting this matter. Counsel for the debtors shall file a statement of fees and costs within ten (10) days of the date of this order and provide the DOT notice of 20 days within which to file any objection; and

IT IS FINALLY ORDERED that should the debtors seek damages in addition to their attorney fees, they must file an adversary proceeding in accordance with Fed. R. Bankr. P. 7001.

DATED this 19th day of September, 1995.

BY THE COURT

/s/ Peter J. McNiff
United States Bankruptcy Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: BEVERLY A. STRAIGHT and MILTON L. STRAIGHT, aka Milton Lloyd Straight, Milton Straight, Mickie Straight Debtors,	)	
WYOMING DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellant, v. BEVERLY A. STRAIGHT and MILTON L. STRAIGHT, Appellees,	)	No. 97-8053
BUSINESS BANKRUPTCY LAW COMMITTEE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION, Amicus Curiae.	)	

ORDER

Filed July 23, 1998

Before **SEYMOUR**, Chief Judge, **PORFILIO**, and **HENRY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ L. Balzano
Deputy Clerk

Supreme Court, U.S.
FILED
OCT 8 1998
CLERK

No. 98-418

In The

Supreme Court of the United States

October Term, 1998

WYOMING DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

BEVERLY A. STRAIGHT

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

In unambiguously abrogating states' Eleventh Amendment immunity in proceedings brought pursuant to 11 U.S.C. §§ 362 & 525(a), did Congress validly legislate pursuant to the Fourteenth Amendment?

II

Did Wyoming waive its Eleventh Amendment immunity from section 362 and 525 proceedings which arose "out of the same transaction or occurrence" as the proof of claim one of its agencies filed against the bankruptcy estate?

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Petitioner's statement is accurate, as far as it goes. It nevertheless omits some crucial facts as found by the bankruptcy and district courts, and left undisturbed by the court of appeals.

The bankruptcy proceedings at issue here arose after Beverly Straight filed her Chapter 13 petition on January 13, 1995. Within a month, she received a letter from the Wyoming Department of Transportation (DOT) indicating its intent to decertify her from participation in Wyoming's Disadvantaged Business Enterprise (DBE) program as a highway flagging contractor. This February 10, 1995, communication asserted that the reason for the proposed action was that "[b]y filing for Chapter 13 bankruptcy, you have lost the ability to control your business; that control now lies in the hands of the Bankruptcy Court and the Bankruptcy Trustee." Pet. 5. The attorney for Ms. Straight informed Wyoming DOT on March 14, 1995, that under Chapter 13 bankruptcy she did have continuing control of her business, and, more importantly, that Wyoming DOT's contemplated decertification would violate 11 U.S.C. § 525, which prohibits a government entity from discriminating against an individual, in the "denial" or "revocation" of a "license, permit," or "similar grant," solely on account of the individual's filing for bankruptcy.

Despite this warning, Wyoming DOT's decertification became final on March 28, 1995, and a letter of that date from Wyoming DOT indicated also that Ms. Straight did not "possess the financial and bonding resources necessary to

operate the business in its field of work." Pet App. 62a. The bankruptcy court found, however, that Ms. Straight had offered evidence of bonding. Id.

On February 27 and March 24, 1995, the Wyoming Department of Employment and Wyoming Workers' Compensation Division filed proofs of claim in the amounts of $2,474.88 and $27,597.42 respectively, as unpaid unemployment taxes and workers' compensation premiums.

On July 25, 1995, Ms. Straight filed a motion for an order to show cause, and for a contempt citation to issue for Wyoming's violation of the automatic stay imposed under 11 U.S.C. § 362, and of the non-discrimination provision of section 525. Straight also sought damages for the loss of contracts she incurred because of Wyoming DOT's withdrawal of her DBE status. See Pet. App. 63a.

In responses to this motion, Wyoming replied that it had not decertified Ms. Straight because of her bankruptcy filing, but, rather, because of the "amount of unpaid payroll liability owed by the Debtor. . . ." Pet App. 24a; see also Pet. App. 20a (where Wyoming referred to Ms. Straight's "accrued payroll taxes"). As both the district court and Tenth Circuit ruled, Pet App. 10a-11a, 58a, in its desire to disavow its admission that it had violated the non-discrimination provision of 11 U.S.C. § 525, it was *Wyoming* that raised the connection between Ms. Straight's owing of payroll taxes (which had been the subject of Wyoming's proofs of claim) and the DBE decertification (the subject of the proceedings brought by Straight). Wyoming thus seeks this Court's review in order to cure its own concession in this case.

REASONS FOR DENYING THE WRIT

1. Respondent questions Wyoming's assertion that there is a genuine split in circuit authority on the constitutionality of 11 U.S.C. § 106(b) (1997). That provision simply articulates a standard of waiver of state Eleventh Amendment immunity from compulsory counterclaims arising from the same transaction or occurrence as the proof of claim that a state filed against a bankruptcy estate. While Respondent grants that the Tenth Circuit, in the opinion below, Pet App. 11a-13a, did uphold the constitutionality of that provision, it is by no means clear that any court of appeals has expressly held § 106(b) as violative of the Eleventh Amendment.[1]

Indeed, section 106(b) has been consistently understood by the courts of appeals following *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), as merely a codification of this Court's common law understanding that a state waives its sovereign immunity in federal bankruptcy proceedings when it appears to press a claim. See also *In re Burke*, 146 F.3d 1313, 1317-20 (11th Cir. 1998); *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998); *Texas v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998); *AER-Aerotron v. Texas Dep't of Transp.*, 104 F.3d 677, 681, 683 (4th Cir. 1997).

[1] *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997), is doubtful as an unqualified rejection of the constitutionality of section 106(b). In that case, the statutory predicates for the assertion of waiver under that provision had not been satisfied. See id. at 1149 ("The trustee's action in this case . . . does not arise out of the same transaction or occurrence supporting Maryland's proof of claim for unrelated taxes."). The Fourth Circuit also acknowledged that, notwithstanding its dicta on the constitutionality of § 106(b), that provision "may correctly describe those actions that, as a matter of constitutional law, constitute a waiver of the Eleventh Amendment." See id. at 1147.

Respondent disagrees with Wyoming's suggestion that these cases -- including the decision from which review is sought here -- are an untoward expansion of this Court's long-standing articulation of the scope of that waiver. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), this Court noted that

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. . . . When the State becomes the actor and files a claim against the fund, it waives any immunity it might otherwise have had respecting the adjudication of the claim.

Id. at 573-74. This confirmed this Court's earlier observation that "[i]f a state desires to participate in the assets of a bankrupt, she must submit to the appropriate requirements of the controlling authority. . . ." *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933); see also *Clark v. Barnard*, 108 U.S. 436, 448 (1883).

Wyoming's interpretation is that *Gardner* allows a state to waive its immunity only as to the disposition of the claim it files, but not as to any compulsory counterclaim the debtor or bankruptcy estate might have. This limiting construction is unsupported by the language of *Gardner*. More importantly, to the extent that § 106(b) may actually codify a higher threshold than *Gardner* -- by requiring (1) that a state file an actual proof of claim, (2) that the counterclaim made by the debtor be the "property of the [bankruptcy] estate," and (3) that it arise from the "same transaction or occurrence" as the state claim -- any criticism of section 106(b) is quite unwarranted.

Upon closer examination, the circuit split that Wyoming complains of is quite illusory. The courts of appeal have, since this Court's decision in *Seminole Tribe*, carefully and narrowly recognized that states may waive their Eleventh Amendment immunity in federal bankruptcy proceedings when they engage in particular litigation conduct.

2. Realizing that there is no real division in circuits on the constitutionality of § 106(b), Wyoming has chosen to hedge its bets by raising questions of the proper construction of that provision. These inquiries seem to assume that § 106(b) is, in fact, a constitutional codification of long-standing common law waiver principles in bankruptcy. Respondent would suggest that, quite apart from Wyoming's inappropriate bundling of constitutional and statutory questions in the same Petition, these issues are not really ready for Supreme Court review. Moreover, this case is not an appropriate vehicle to resolve the ancillary problems raised in the situational -- and fact-dependent -- application of section 106(b)'s requirements.

a. Respondent understands Petitioner to argue that the Tenth Circuit erred in its ruling that Wyoming should be treated as a single entity, for purposes of establishing that a proof of claim filed against the Straight estate by the Wyoming Department of Employment acted as a waiver of Straight's counterclaim against Wyoming DOT. Petitioner suggests that the problem of statutory interpretation implicated here -- the meaning of the phrase "such governmental unit" in § 106(b) -- has a constitutional dimension and must be resolved in reference to a canon of construction requiring that statutory waivers of state sovereign immunity must be unambiguous.

Respondent doubts, however, whether § 106(b) is properly understood as a statutory waiver of sovereign

immunity, and thus subject to the canon mentioned in the cases upon which Wyoming relies. Pet. 12. Instead, section 106(b) should be regarded as a codification of the common law conditions in which a sovereign -- by its litigation conduct in a bankruptcy proceeding -- will be deemed to have waived its immunity from compulsory counterclaims arising from the sovereign's own claims.

Wyoming complains also that the Tenth Circuit failed to recognize that the meaning of "such governmental unit" is inherently ambiguous. Petitioner actually faults the court below for referring to Wyoming's own law for its ruling that Wyoming considers itself a unitary creditor, a conclusion that Petitioner apparently does not dispute here. This issue might be appropriate for review had the court of appeals misapplied controlling principles of state or federal law regarding a governmental entity's unitary creditor status, but the Tenth Circuit did not commit that error. Wyoming is thus left to quibble that the court of appeals failed to apply a canon of construction that has only dubious applicability to this case.

Wyoming has also failed on this point to establish any compelling need for the Court to establish a standard for when a governmental entity will be treated as a unitary creditor. The decision below appears to be the first by a court of appeals to address this particular matter. Nor is it by any means clear that any bankruptcy court has taken a position contrary to that ruled by the Tenth Circuit.[2]

[2] Of the cases relied upon by Petitioner to raise this conflict, Pet. 13 n.6, two (*In re Leeth Constr. Co.*, 170 B.R. 684, 685 (Bankr. D.Ariz. 1994) and *In re R & W Enter.*, 181 B.R. 624, 639 (Bankr. N.D.Fla. 1994)) involve the United States as a unitary creditor – a question that may be analytically distinct from the status of state entities. One case (*In re Four Seasons Care Ctrs.*, 119 B.R. 681, 683-84 (Bankr. D.Minn. 1990)), was decided prior to the amendment of the current version of § 106(b), and the earlier statute's omission of a

(continued...)

b. The other ground for review raised by Wyoming is that the Tenth Circuit improperly applied the "same transaction or occurrence" test to the facts of this case. Wyoming appears to concede that the court of appeals applied the proper analysis of Fed. R. Civ. P. 13(a) for determining compulsory counterclaims. Moreover, Petitioner agrees that the courts of appeals have generally applied the Fed. R. Civ. P. 13(a) standard to determine when a debtor's counterclaim arises from the "same transaction or occurrence" as the proof of claim filed by a state.

Wyoming declines to articulate an alternative standard to be applied by the courts in these cases. Indeed, it cannot proffer such a standard, since such determinations are intimately connected with the factual context of a state's proof of claim and the debtor's counterclaim. Wyoming is extravagant to suggest that the Tenth Circuit ruled that any counterclaim arising from Respondent's business would have been covered by Wyoming's waiver. In truth, Wyoming seeks this Court's review simply to alter a factual conclusion made by the bankruptcy and district courts, and left undisturbed on appeal: that it was *Wyoming* which argued that the Wyoming DOT's revocation of Ms. Straight's DBE certificate was related to her non-payment of employment taxes.

3. Respondent trusts that these intimations will persuade the Court that this case is unworthy of plenary review. If, however, this Court is nevertheless disposed to

[2](...continued)
"same transaction or occurrence" standard was found to be dispositive. The last two cases (*In re William Ross, Inc.*, 199 B.R. 551, 555 (Bankr. W.D. Pa. 1996) and *In re Rocchio & Sons, Inc.*, 165 B.R. 86, 87 (Bankr. D.R.I. 1994)), did not reach the unitary creditor issue, but ruled, instead, that the debtor had failed to show that its counterclaim arose from the "same transaction or occurrence" as the proof of claim filed by a state entity.

grant the Petition, there is a threshold issue that may require the Court's attention. Respondent raised below an argument that Congress had validly *abrogated* Wyoming's Eleventh Amendment immunity when it legislated 11 U.S.C. § 106(a).[3] Respondent argued below that this abrogation of Eleventh Amendment immunity was unequivocally expressed by Congress, and, to the extent that it concerned enforcement of the non-discrimination and automatic stay provisions of the Bankruptcy Code, 11 U.S.C. §§ 362 & 525, was enacted pursuant to the Fourteenth Amendment.

This argument was accepted by both the bankruptcy court, Pet. App. 65a, and by the district court. Pet. App. 28a-52a. It was renewed before the Tenth Circuit, see Pet. App. 5a, but that court chose not to address it.[4] Respondent

[3] 11 U.S.C. § 106(a) (1997) provides in pertinent part that "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . with respect to the following: (1) Sections . . . 362 . . . [and] 525 . . . of this title." Id.

[4] Whether § 106(a) was a valid abrogation of states' Eleventh Amendment immunity under the Fourteenth Amendment has been considered by a number of courts of appeals. Most, relying on language in this Court's *Seminole Tribe* decision, 116 S.Ct. 1114, 1131-32 n.16, and the reasoning of *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), have held that § 106(a) could only have been legislated pursuant to the Bankruptcy Clause of Article I and otherwise exhibits no Fourteenth Amendment concerns. See *In re Creative Goldsmiths*, 119 F.3d at 1144-47; *In re Fernandez*, 130 F.3d 1138, 1139 (5th Cir. 1997); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 243-45 (3d Cir. 1998).

None of these cases, however, concerned a bankruptcy proceeding brought pursuant to 11 U.S.C. § 525, which provides that

> a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor. . . solely because such bankrupt or debtor is or has been a debtor. . . .

(continued...)

is clearly entitled to raise the abrogation argument as another ground for affirmance, and wishes to reserve its right to do so. Nevertheless, the Court may wish to instruct the parties as to whether it wishes briefing on this subject, and thus to revise the Questions Presented offered by Wyoming.

[4](...continued)

11 U.S.C. § 525(a). Respondent is prepared to argue that it is within Congress' power, under the Equal Protection Clause, to remedy governmental discrimination against individuals solely on account of their bankruptcy status by making that government amenable to suit in a federal bankruptcy proceeding.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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No. 98-418

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In The

Supreme Court of the United States

October Term, 1998

WYOMING DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

BEVERLY A. STRAIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE STATES OF NEW MEXICO, ALASKA, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, KANSAS, MICHIGAN, MONTANA, NEBRASKA, OHIO, OREGON, UTAH, THE COMMONWEALTH OF MASSACHUSETTS, THE COMMONWEALTH OF PENNSYLVANIA, AND THE COMMONWEALTH OF VIRGINIA AS *AMICI CURIAE*

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INTEREST OF *AMICI CURIAE*

In the last year, over 1.4 million bankruptcy petitions were filed in the United States by individuals and businesses that collectively owe many tens of millions of dollars in taxes and other debts to the States. That number has risen dramatically over the last few years and may continue to rise. Once a bankruptcy petition is filed, filing a proof of claim in bankruptcy court is often the only mechanism available to the state for obtaining even partial payment of the debt. Annually, state governmental entities file hundreds of thousands of proofs of claim in bankruptcy court. Indeed, in many cases, States are obligated by other federal laws to file claims in bankruptcy cases in order to participate in programs of benefit to their citizens.

The Bankruptcy Code, 11 U.S.C. section 101 *et seq.*, purports to "abrogate" "sovereign immunity" with respect to most bankruptcy proceedings, 11 U.S.C. 106(a), and further provides that a "governmental unit" (which includes a state) is "deemed to have waived" sovereign immunity under certain circumstances, 11 U.S.C. 106(b). The Tenth Circuit's opinion below concluded that, pursuant to those provisions, a state that filed any claim in a case relating to the debtor's business waived its immunity with respect to *any* claim filed against the state by the debtor that related in any way to the debtor's business, without limitation in nature or amount. *In re Straight*, 143 F.3d 1387 (10th Cir. 1998).

The *amici* States have a vital interest in this case, because the decision below significantly, unfairly and erroneously vitiates the States' constitutional Eleventh

Amendment immunity through the Tenth Circuit's employment of an artificial notion of "waiver," which is without any meaningful limits. The decision below significantly erodes the protection accorded to the States in the Eleventh Amendment of the Constitution whenever any state agency files any claim in bankruptcy court. It forces the States to either forego all contact with the bankruptcy system or surrender their constitutionally protected immunity with respect to matters which they have not voluntarily submitted for resolution by the federal courts. This is a choice that the Constitution does not require the States to make.

SUMMARY OF ARGUMENT

The court below determined that a state could be sued for monetary damages in bankruptcy court, reasoning that, because state agencies had filed claims for pre-bankruptcy taxes, the state was "deemed," pursuant to Section 106(b), to have waived its constitutional immunity from a cause of action arising from activities of its transportation department during the bankruptcy case. The court below ruled that this statutorily "deemed waiver" was valid. In addition to the award of attorneys fees and costs, the decision also left open the ability of the debtor to pursue its suit for further damages of $250,000 against the state in a related pending lawsuit.

To the extent the decision below rests on the common law decisions regarding waiver of sovereign immunity in bankruptcy, the decision directly conflicts with *Gardner v. New Jersey*, 329 U.S. 565 (1947), *In re Friendship Medical*

Center, Ltd., 710 F.2d 1297 (7th Cir. 1983) and *Ohio v. Madeline Marie Nursing Homes #1 and #2*, 694 F.2d 449 (6th Cir. 1982). Those cases held that a state waives immunity in bankruptcy court only to the extent necessary to determine or challenge the allowance of the state's claim. More broadly, the decision conflicts with numerous decisions in other areas of the law which utilize the same limited standard for waivers of immunity. *See U.S. v. Shaw*, 309 U.S. 495, 504 (1940) (by filing a claim in a probate proceeding, the United States only surrendered its immunity to the extent necessary to defeat the United States' claim); *U.S. v. Forma*, 42 F.3d 759, 764-65 (2d Cir. 1994) (the filing of a law suit by the Internal Revenue Service does not create jurisdiction to consider permissive counterclaims against the Service or to enter affirmative relief on any counterclaim).

To the extent the decision below rests on Congressional authority to control the scope of the state's Eleventh Amendment immunity, the decision directly conflicts with *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1147 (4th Cir. 1997), and cannot be reconciled with *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct 1114 (1996). In *Seminole*, this Court ruled that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government." *Id.* at 1131. The Court further noted that it "never has awarded relief against a State under [the bankruptcy] scheme[ ]." *Id.* 1132 n.16.

Pursuant to the reasoning of *Seminole*, the Fourth Circuit has ruled that the deemed waiver provision, Section 106(b), is unconstitutional, in that it simply represents abrogation under a different name. *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1147 (4th Cir. 1997). Contrary to the Fourth Circuit, the Tenth Circuit's decision finds that Section 106(b) is constitutional based on a fundamental misreading of this Court's previous holding in *Gardner v. New Jersey*, 329 U.S. 565 (1947). This error must be corrected in order to ensure that the protections of the Eleventh Amendment are not eliminated by application of a waiver exception so broad that it swallows up the rule of immunity.

ARGUMENT

The petitioner's transportation department decertified the debtor from her eligibility to participate in a minority contractor program after she filed for bankruptcy. The bankruptcy court found this action violated the Code's automatic stay, 11 U.S.C. 362(a), and antidiscrimination provisions, 11 U.S.C. 525. The petitioner was ordered to reinstate the debtor's certification, and has done so. The petitioner does not contest those determinations here,[1] nor does the petitioner contest the obligation of the state to comply with the automatic stay or

[1] The state did not believe that it had violated the bankruptcy laws, arguing that its actions were actually motivated by bonding and financial responsibility concerns, which would be appropriate bases upon which to exercise its police and regulatory powers. *See, e.g., Duffey v. Dollison*, 734 F.2d 265 (6th Cir. 1984) (although state may not condition

with other bankruptcy laws. The only issue before the Court is the power of the federal bankruptcy courts to order affirmative monetary relief against a state agency on the basis that a different state agency "waived" the entire state's Eleventh Amendment immunity by submitting a claim to the bankruptcy court.

(a) Sovereign Immunity Prior to the Bankruptcy Reform Act of 1978

Prior to the Bankruptcy Reform Act of 1978, the federal government had not attempted to "abrogate" sovereign immunity or "deem" a waiver of state sovereign immunity in the bankruptcy courts. Since 1978, Congress has attempted to legislate the extent to which a state may be subjected to bankruptcy court orders, including those for monetary relief.[2] In *Seminole Tribe of Florida v. Florida,*

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renewal of driver's license upon payment of a discharged debt, the state may require a driver, who had failed to pay a judgment arising from an automobile accident, to comply with non-discriminatory financial responsibility laws which require either a three year insurance policy or a surety bond); *In re Synergy Dev. Corp.*, 140 B.R. 958 (Bankr. S.D.N.Y. 1992) (state could require Chapter 11 debtor health club to post a $50,000 bond, which was required of all health clubs in New York State). The petitioner is no longer contesting the bankruptcy court's conclusion. The merits of the action, however, have no bearing on whether the Eleventh Amendment applies.

[2] The first effort was deemed inadequate in *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989) and *U.S. v. Nordic Village, Inc.*, 503 U.S. 30 (1992). Current language, adopted in 1994, was a Congressional effort to respond to the Court's holding that the original language was not a clear and unequivocal abrogation of immunity.

___ U.S. ___, 116 S. Ct. 1114 (1996), this Court ruled that Congress cannot constitutionally abrogate a state's Eleventh Amendment sovereign immunity through legislation enacted pursuant to Article I of the Constitution. The net result of the *Seminole* opinion, therefore, was to substantially reestablish the common law rules regarding the extent to which a state waives its immunity by participating in a bankruptcy. Those rules were well settled by an essentially unanimous line of authority under the Bankruptcy Act of 1898.

The decision below rests on the belief that Section 106(b) merely codifies (or indeed narrows) the common law standard of waiver that was in effect under the Bankruptcy Act. But this conclusion does not withstand analysis. Under the common law, the scope of waiver in bankruptcy occasioned by the filing of a proof of claim was the same as in non-bankruptcy proceedings. When the government brings an action in any other court, it is uniformly recognized that the government waives its immunity only with respect to recoupment of compulsory counterclaims that allow the defendant to diminish the amount claimed by the government. The government does not waive immunity for *any* affirmative relief, even relief stemming from compulsory counterclaims. *See U.S. v. Forma*, 42 F.3d 759, 764-65 (2d Cir. 1994) (collecting cases) ("Whatever the explanation, it has long been absolutely clear that the exception does not permit any affirmative recovery against the [government] on a counterclaim that lacks an independent jurisdictional basis.").

When governmental creditors filed claims in cases decided under the Bankruptcy Act, virtually all courts of appeals adopted the same rationale. *See, e.g, In re Friendship Medical Center, Ltd.*, 710 F.2d 1297, 1300 (7th Cir. 1983) (state only waives its sovereign immunity by filing a claim to the extent necessary to determine the merits of that claim; no affirmative recovery is available); *Ohio v. Madeline Marie Nursing Homes #1 and #2*, 694 F.2d 449, 461-62 (6th Cir. 1982) (same); *Danning v. United States*, 259 F.2d 305, 310 (9th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959) (same result with respect to federal government); *In re Oxford Marketing, Ltd.*, 444 F.Supp. 399, 404-05 (N.D. Ill. 1978) (same). *See also In re Monongahela Rye Liquors, Inc.*, 141 F.2d 864, 868-69 (3rd. Cir. 1944) (although bankruptcy court has power to determine state's tax claim, it has neither jurisdiction to set off the tax against an unrelated debt nor to condition the payment of the tax claim upon the state's payment of an unrelated obligation). *See generally*, Jenkins, *Jurisdiction of the Bankruptcy Court to Deal with Claims of the Sovereigns, Objections to Such Claims and Counterclaims Against the Sovereign*, Journal of the National Conference of Referees in Bankruptcy 104 (1969).

(b) The Opinion Below

The court below determined that it did not have to reach the issue of whether Section 106(a), which contains an expansive abrogation of sovereign immunity, is constitutional in light of *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996). Instead, the Tenth Circuit held that the bankruptcy court's judgment could be viewed as being issued pursuant to Section 106(b), which

deals with the extent to which the government is deemed to have waived its immunity with respect to compulsory counterclaims by filing a proof of claim in the bankruptcy case. The court concluded that Section 106(b) is constitutional, based on a conclusory and overly broad reading of *Gardner v. New Jersey*, 329 U.S. 565 (1947).

Gardner held that a state which files a claim submits to the bankruptcy court's power to consider the merits of that claim. According to the Tenth Circuit, Section 106(b) does no more than codify (and indeed limit) the *Gardner* holding. "This enactment codifies the *Gardner* rule . . . but narrows its applicability to permit the debtor to proceed only against claims asserted by the state that arose out of the same transaction or occurrence as the claim previously filed by the state in the bankruptcy court." 143 F.3d at 1390. The court essentially repeated this analysis later in the opinion, when it stated that section "106(b) does not pretend to abrogate a state's immunity, it merely codifies an existing equitable circumstance under which a state can choose to preserve its immunity by not participating in a bankruptcy proceeding or to partially waive that immunity by filing a claim. . . . Thus, section 106(b) follows the lead already established by the Supreme Court in *Gardner v. New Jersey.*" 143 F.3d at 1392.

The problem here is that the Tenth Circuit's view of *Gardner* is incorrect. Indeed, to the extent *Gardner* supports any rule on waivers regarding counterclaims, it is consistent with the common law view. There were no counterclaims of *any* nature in *Gardner*, a fact which the Court acknowledged as supporting the bankruptcy court's jurisdiction over the proceeding. The only issue in that case was whether the bankruptcy court was barred,

on Eleventh Amendment grounds, from hearing the trustee's objection to the state's claim. In fact, other courts of appeals have construed *Gardner* as implicitly limiting the ability to obtain affirmative relief against a government that files a proof of claim.

A persuasive analysis of *Gardner* is presented in *In re Friendship Medical Center, supra,* 710 F.2d at 1300-01:

> The [*Gardner*] Court held that where the state had filed the claim and where no one was seeking money from the state, there was no sovereign immunity problem. "If the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State." *Id.* at 573-74. The Court concluded that the immunity is waived to the extent necessary to adjudicate the claim made by the state. "When the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Id.* at 574.
>
> . . . .
>
> As noted, *Gardner* . . . establish[es] that the limited waiver of sovereign immunity created by the filing of the claim extends only so far as necessary to adjudicate that claim, such as considering the objection of other parties to the claim.

Another court of appeals reached the same result with little discussion:

> [W]e are bound by a long line of cases to hold that an affirmative judgment against the [government] cannot be entered on a counterclaim without specific statutory authorization for affirmative relief against the government on the counterclaim as such. [citations omitted]. This does not mean that . . . the government's claim may not be contested, *Gardner v. New Jersey*, 329 U.S. 565 (1947).

Danning v. U.S., 259 F.2d 305, 309 (9th Cir. 1958).

The court below recognized that this Court's decision in *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 1124 (1996) requires that there be a "valid exercise of power" before Congress can abrogate Eleventh Amendment immunity. 143 F.3d at 1392. The Tenth Circuit concluded, however, that section "106(b) does not pretend to abrogate a state's immunity, it merely codifies an existing equitable circumstance under which a state can . . . partially waive that immunity by filing a claim." *Id.* The court erred, though, by failing to recognize the extent to which Section 106(b) exceeds the common law waiver inherent in the voluntary filing of an action by the state in federal court.

Section 106(b) provides that a "governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." This language fails to incorporate the "no affirmative relief" limitation on recovery from mandatory

counterclaims, thus expanding the recognition of waiver provided by the common law.[3] It is obvious that a "deemed waiver" can be an involuntary elimination of immunity under a different label. *See In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1147 (4th Cir. 1997) (ruling that the waiver must be an *actual* waiver, that Congress has no authority to "deem" a waiver which did not occur, and that " 'constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.' " (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). The Tenth Circuit thought that the Fourth Circuit missed the point because Section 106(b) merely "follows the lead already established by the Supreme Court in *Gardner v. New Jersey*." 143 F.3d at 1392. However, Section 106(b) cannot be derived from *Gardner*. Accordingly, the Tenth Circuit is left without support for its conclusion that Section 106(b) is constitutional.

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[3] Some courts such as the Tenth Circuit in this case, and the Eleventh Circuit in *In re Burke*, 146 F.3d 1313, 1317, fn.8 (11th Cir. 1998), have indicated that they believe Section 106(b) codifies the common law of waiver. It should be clear, though, from the cases cited above, that Section 106(b) is actually an expansion of the waiver recognized at common law. *See also In re Koehler*, 204 B.R. 210 (Bankr. D. Minn. 1997) (noting the overbreadth of Section 106(b) and allowing a recoupment claim against the government only up to the amount of government's claim against the debtor). This broad reading of the intended scope of Section 106(b) is supported by the legislative history of its predecessor – Section 106(a) of the Bankruptcy Reform Act of 1978. "The counterclaim by the estate against the governmental unit is without limit." *House Report No.* 95-595, *95th Cong., 1st Sess.* 317 (1977).

The petitioner persuasively argues that the lawsuit by the debtor below, which arises from post-bankruptcy conduct of the state transportation department, cannot be accurately characterized as a compulsory counterclaim to the other state agencies' tax claims.[4] The debtor's lawsuit does not appear to fall within the scope of Section 106(b). To the extent the Court agrees with the petitioner on this point, the respondent may seek to save the result below under the notion that the constitutional analysis of *Gardner* supports the disposition below, whether the lawsuit be characterized as a permissive or compulsory counterclaim. As established above, the cases decided under the Bankruptcy Act certainly never understood *Gardner* to stand for the novel formulation of waiver of sovereign immunity that the Tenth Circuit espouses below. While Congress may have tried to statutorily "deem" a waiver

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[4] The *amici* States concur in the statutory analysis by the petitioner with respect to the meaning to be accorded to the phrase "same transaction or occurrence" in Section 106(b) and the ambiguity of the term "governmental unit" as used in that section. As further support for the split of authority cited by the petitioner with respect to the "same transaction or occurrence" language, *see In re Malinowski*, 1998 WL 484598 (2nd Cir. 8/19/98) (agreeing with *In re University Medical Ctr.*, 973 F.2d 1065, 1081 (3rd Cir. 1992) that same transaction and occurrence means " 'both debts . . . arise out of a single integrated transaction so that it would be inequitable for [a party] to enjoy the benefits of that transaction without also meeting its obligations.' "). Moreover, if it is appropriate to strictly limit the "same transaction and occurrence" language when the state seeks to rely on it to recoup payments it has made, surely the same phrase should be given an equally limited interpretation when a private party seeks to rely thereon to deprive a state of its constitutional immunity.

of immunity from affirmative monetary relief, the reasoning of *Seminole* and *Creative Goldsmiths* makes clear that Congress simply does not have the constitutional power to do so.

The *amici* States are deeply concerned by the decision below because it circumvents the States' constitutional Eleventh Amendment immunity and this Court's decision in *Seminole* through the use of a distorted reading of this Court's earlier decision in *Gardner.* The court below has read *Gardner* and Section 106(b) in ways that would render the States' Eleventh Amendment immunity a meaningless abstraction in bankruptcy so long as any government agency files any claim. The combination of its sweeping interpretations of *Gardner*, the definition of a "governmental unit" and the definition of the "same transaction or occurrence," could enable unlimited monetary recovery by the debtor against the state, so long as any of its agencies files any claim.

While the rule announced by the court below is alarming even if the state were always free to choose whether to file a given claim, the effect is even more disconcerting considering that federal law generally *requires* States to file claims in certain instances, such as with student loans.[5] Under the Tenth Circuit's holding,

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[5] 34 C.F.R. 674.49(b) Proof of claim. "The institution shall file a proof of claim in the bankruptcy proceeding, unless, in the case of a proceeding under chapter 7 of the Bankruptcy Code, the notice of meeting of creditors states that the borrower has no assets." One court even reached the absurd result of holding that this federal regulation constituted a valid waiver on behalf of the state, because the state enacted a statute which permitted

such a required claim could potentially open up the state's treasury to any action of the debtor. Surrendering the state's immunity from any lawsuits by borrowers who file for bankruptcy should not be the price for participating with Congress in the student loan program. The Court should reverse the opinion below and restore the status of the law to the situation which existed for the first 180 years of this nation's history.

CONCLUSION

For all of the foregoing reasons, *amici* States respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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it to abide by federal regulations. *In re Innes*, 207 B.R. 953 (Bankr. D. Kan. 1997).

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In The

Supreme Court of the United States

October Term, 1998

WYOMING DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

BEVERLY A. STRAIGHT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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STATEMENT OF INTEREST

The New York County Lawyers' Association (the "Association") is an organization of approximately 9,300 members, which was founded in 1908. The Association and its committees periodically take positions on legal issues and intervene as amicus curiae in cases which are important to the public and legal profession.

The Business Bankruptcy Law Committee of the Association (the "Committee") has become concerned about the effect that the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has had upon the practice of bankruptcy. It has filed *amicus curiae* briefs in support of the constitutionality of section 106 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the Third, Fifth, Tenth and Eleventh Circuit Courts of Appeals and has participated in oral argument before the Tenth and Eleventh Circuits, including the present case.

In order to avoid major problems in the practice of bankruptcy, the Committee believes that the constitutionality of section 106 of the Bankruptcy Code needs to be addressed by this Court. This brief is submitted in support of the petition for a writ of certiorari filed by Wyoming (the "Wyoming Petition"). While the Committee's position on the merits of this case may benefit the Respondent, the Committee has no stake in the recovery that any party may receive in connection with the case.[1]

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1. The Committee is simultaneously filing the written consent of Petitioner and Respondent to the submission of this brief. Counsel for a party did not author this brief in whole or in part, and no person or entity other than the Committee, its members or its counsel, have made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Wyoming is asking this Court to resolve a conflict among the federal circuit courts of appeals with respect to the constitutionality of section 106(b) of the Bankruptcy Code in a controversy arising out of a violation of the automatic stay.[2] Section 106(b) defines the extent to which a state waives its Eleventh Amendment immunity by the filing of a proof of claim in bankruptcy.

Congress traditionally had undertaken the delicate task of balancing the competing interests represented by a state's sovereign immunity and the need to administer all of a debtor's assets and liabilities in a centralized proceeding. This Court's opinion in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has undermined the authority of Congress in this area, and the Court's decades old decisions involving the adjudication of a state's claim in bankruptcy fail to provide a clear guide. The resulting dangers are reflected not only in the differences among the federal circuit courts of appeals, but also in opinions by courts on all levels, which often reconcile the inherent conflict between Eleventh Amendment immunity and the collective nature of a bankruptcy with rulings which undermine established Eleventh Amendment doctrines.

In addition to the waiver of state sovereign immunity provided in section 106(b), also fully briefed and argued before the Tenth Circuit was the issue of Congress's power to abrogate a state's Eleventh Amendment immunity in section 106(a) of the Bankruptcy Code. These two issues are inextricably linked,

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2. Wyoming also seeks this Court's review of two questions involving the interpretation of the text of section 106(b). The Committee understands that the Respondent shall be filing papers in opposition to the Court's review of these questions, which position the Committee adopts.

because if Congress has the power to abrogate Eleventh Amendment immunity, less reliance upon the doctrine of waiver is required in order to preserve the orderly operation of the bankruptcy system.

The collective nature of a bankruptcy distinguishes the issues in *Straight* from other Eleventh Amendment controversies. By examining the issue of waiver in *Straight* the Court can answer the essential question of what Eleventh Amendment rights are relinquished by a state when a proof of claim is filed. In addressing this question, the Court can determine whether waiver is even a factor, or whether Congress has the power to abrogate a state's Eleventh Amendment immunity in matters involving the Bankruptcy Code's automatic stay.

REASONS FOR GRANTING THE WRIT

I.

AFTER *SEMINOLE TRIBE* NO CLEAR UNDERSTANDING EXISTS ON THE EXTENT TO WHICH STATES ARE SUBJECT TO BANKRUPTCY COURT JURISDICTION.

In 1996 this Court ruled in *Seminole Tribe* that Congress lacked the power under the Commerce Clause in Article I of the Constitution to abrogate a state's Eleventh Amendment immunity. In a footnote, the *Seminole Tribe* Court stated that this same principle was applicable in bankruptcy, but provided no detailed discussion of the issue. *Seminole Tribe*, 116 S. Ct. at 1131 n.16. Thus, a void was created, which the lower courts have been unable to fill.

States are among the most significant parties in bankruptcy. *See* "State Bankruptcy Survey Results," 29 *Bankruptcy Court*

Decisions 21 at 1 (November 19, 1996). However, following this Court's decision in *Seminole Tribe*, lower courts routinely have ruled that the Eleventh Amendment bars a bankruptcy court from asserting jurisdiction over a state in the absence of a state's filing of a proof of claim. *See, e.g., In re Mitchell*, 222 B.R. 877 (BAP 9th Cir. 1998) (bankruptcy court lacks jurisdiction to determine dischargeability of state income tax debt); *In re Christie*, 222 B.R. 64 (Bankr. D. N.J. 1998) (bankruptcy court must vacate prior order voiding state's lien on debtor's exempt property, as no proof of claim filed); *In re Tri-City Turf Club, Inc.*, 203 B.R. 617 (Bankr. E.D. Ky. 1996) (bankruptcy court lacks jurisdiction over action to enjoin state agency from revoking debtor's license in violation of automatic stay). The filing of a proof of claim has become a prerequisite for establishing a bankruptcy court's jurisdiction over a state.

The waiver of Eleventh Amendment immunity triggered by the filing of a proof of claim was recognized by this Court more than half a century ago in *Gardner v. New Jersey*, 329 U.S. 565 (1947). The opinion in *Gardner*, however, does not clearly delineate the extent of that waiver. Prior to this Court's opinion in *Seminole Tribe*, Congress shouldered that burden. Now, as described in the Wyoming Petition, major conflicts have arisen among the federal circuit courts of appeals regarding the consequences which arise from the filing of a proof of claim by a state in bankruptcy.

Central to these differing interpretations is the underlying constitutional question of the extent to which the filing of a proof of claim constitutes a waiver of Eleventh Amendment immunity. As described in the Wyoming Petition, the Tenth Circuit in *Straight* upheld the constitutionality of Congress's definition of the degree of waiver provided in section 106(b) of the Bankruptcy Code, the provision which defines the extent to which sovereign immunity is waived by the filing of a proof

of claim. In contrast, the Fourth Circuit in *In re Creative Goldsmiths of Washington, D.C. Inc.*, 119 F.3d 1140 (4th Cir. 1997) found that under the rule established by this Court in *Seminole Tribe*, Congress's attempt to define waiver in section 106(b) constituted an unconstitutional attempt to abrogate Eleventh Amendment immunity.

The Fourth Circuit, nevertheless, did not deny that some form of waiver was created by the filing of a proof of claim. Instead, it ruled that the filing of a proof of claim subjects a state to suit for a compulsory counterclaim arising from the same transaction which is the subject of the state's proof of claim. However, absent from the *Creative Goldsmiths* opinion is any real justification for why the assertion of a compulsory counterclaim against a state does not violate the Eleventh Amendment. The *Creative Goldsmiths* Court simply reasoned that

> it would violate the fundamental fairness of judicial process to allow a state to proceed in federal court and at the same time strip the defendant of valid defenses because they might be construed to be affirmative claims against the state.

Id. at 1148. Nowhere in the opinion does the Fourth Circuit explain how a bankruptcy court's equitable powers may supersede the dictates of the Eleventh Amendment.

The Eleventh Circuit in *In re Burke*, 146 F.3d 1313 (11th Cir. 1998) adopted an alternative strategy in analyzing the consequences of the filing of a proof of claim. The *Burke* court declined to rely upon the definition of waiver in section 106(b) given this Court's opinion in *Seminole Tribe*. *Id.* at 1317; nor was it willing to accept the compulsory counterclaim rule as a measure for defining a waiver of Eleventh Amendment

immunity. *Id.* at 1320 n.13. Instead, the Eleventh Circuit ruled that where a debtor's claims against a state involve the same taxes as are the subject of a state's proof of claim, and where the recovery sought is limited to costs and attorneys' fees, a bankruptcy court's resolution of the claim falls "easily within the waiver of immunity" established in *Gardner*. However, the *Burke* court failed to provide any definition of the extent of that waiver.

Underlying the opinions in *Straight*, *Creative Goldsmiths* and *Burke* is the understanding that under the rule set forth by this Court in *Gardner*, when a state files a proof of claim, it subjects itself to the jurisdiction of a bankruptcy court. Prior to this Court's opinion in *Seminole Tribe*, the universally accepted limits of that jurisdiction were defined by Congress in the Bankruptcy Code. However, as *Seminole Tribe* has undermined the authority of Congress to define those limits, the federal circuit courts of appeals now require the guidance of this Court in defining this very delicate balance in state and federal power.

Prior to the opinion in *Seminole Tribe*, basic constitutional questions involving the Eleventh Amendment and bankruptcy could remain shrouded. For example, this Court ruled in *New York v. Irving Trust Co.*, 288 U.S. 329 (1933) that sovereign immunity did not bar a state from being subject to a bankruptcy court's order limiting the time within which a claim against a debtor could be filed. However, the *Irving Trust* Court relied simply upon the need for the "orderly" operation of the bankruptcy process. *Id.* at 333; no attempt was made to describe how a state could be subjected to a bankruptcy court's order absent the filing of a proof of claim. This Court's opinion in *Seminole Tribe* now imposes a much more exacting Eleventh Amendment test upon challenges to a state's sovereign immunity in bankruptcy, a test for which the Court's prior opinions fail to provide clear parameters.

For example, in *In re Platter*, 140 F.3d 676 (7th Cir. 1998) the Seventh Circuit Court of Appeals found that a bankruptcy court's most essential power, the authority to discharge a debt, was contingent upon a state's filing of a proof of claim or an equivalent action, *i.e.*, commencing an adversary proceeding to determine the dischargeability of the debt. Similarly, the Fifth Circuit Court of Appeals in *Magnolia Venture Capital Corp. v. Prudential Securities, Inc.*, 151 F.3d 439 (5th Cir. 1998) dismissed an adversary proceeding in which a debtor sought a determination of whether its $11,000,000 account with Prudential Securities was subject to the lien of a state. Although the loan agreement under which the alleged lien was granted included a venue provision agreeing to federal court jurisdiction, the Fifth Circuit ruled that such a waiver was insufficient. It declared that the "Supreme Court has made it clear that we may find a waiver of a state's Eleventh Amendment immunity in only the most exacting circumstances." *Id.* at 443. Similarly, in *Creative Goldsmiths*, the Fourth Circuit declared that given past Supreme Court precedents in non-bankruptcy cases, it was required to narrowly construe the degree to which a state waives its sovereign immunity by the filing of a proof of claim. *Creative Goldsmiths*, 119 F.3d at 1148.

Given the contrast between the reasoning in these cases and the approach adopted below by the Tenth Circuit in *Straight*, it is clear that this Court's guidance is required to resolve the conflict over the extent to which a state waives its Eleventh Amendment immunity by filing a proof of claim in bankruptcy. It now is apparent that the decades old decisions of this Court in *Gardner* and *Irving Trust* no longer suffice in this post *Seminole Tribe* era, in which Congress is viewed by most courts as lacking the power to balance state sovereign immunity and bankruptcy concerns.

II.

THIS COURT'S REVIEW IS REQUIRED TO ELIMINATE THE CONFUSING AND MISLEADING ELEVENTH AMENDMENT PRECEDENTS BEING CREATED IN BANKRUPTCY IN THE POST *SEMINOLE TRIBE* ERA.

Following the opinion in *Seminole Tribe*, numerous courts have recognized the basic conflict between *Seminole Tribe's* broad application of the Eleventh Amendment and "the policy imperatives of federal bankruptcy law." *In re C.J. Rogers, Inc.*, 212 B.R. 265, 276, n.5 (Bankr. E.D. Mich. 1997). Some courts have asserted continued bankruptcy court jurisdiction over a state in ways which violate basic Eleventh Amendment doctrines.

For example, in *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), the Fifth Circuit Court of Appeals ruled that the discharge of a debt to a state did not violate the Eleventh Amendment, because it is a state's choice whether to participate in a bankruptcy, while a bankruptcy court possesses the authority to issue an order discharging a debt "by virtue of the Supremacy Clause." *Id.* at 822. The fallacy in that reasoning is that the constitutionality of any act of Congress could withstand an Eleventh Amendment challenge, if the Supremacy Clause were an adequate shield against such an attack.[3]

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3. This is not to suggest that Supremacy Clause issues are not implicated in Eleventh Amendment controversies arising in bankruptcy. For example, in one of this Court's seminal Supremacy Clause opinions, *Perez v. Campbell*, 402 U.S. 637 (1971), it was determined that a state could not condition the restoration of an uninsured debtor's driver's license upon his payment of a judgment arising from an auto accident. Although the *Perez* Court recognized that a state had a legitimate police

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Similar problems have arisen in bankruptcy from an overly broad application of the *Ex parte Young* exception to Eleventh Amendment immunity. For example, in *In re Guiding Light Corp.*, 213 B.R. 489 (Bankr. E.D. La. 1997) the bankruptcy court refused to dismiss a suit brought against the head of the Louisiana Department of Health and Hospitals for wrongfully withholding post-petition payments owing to a debtor. The *Guiding Light* court refused to dismiss the suit, because one of the counts was framed as a request for an order prohibiting the department head from exercising continued control over previously withheld funds. *Id.* at 492. Such a ruling obviously goes beyond the *Ex parte Young* exception allowing for prospective relief, as the suit remained an action seeking direct payment from the state treasury. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 664-671 (1974).

This Court has ruled that actions for any form of relief against a state fall within the scope of the Eleventh Amendment. *See, Missouri v. Fiske*, 290 U.S. 18, 28 (1933). Yet, in *In re Barrett Refining Corp.*, 221 B.R. 795, 807-808 (Bankr. W.D. Okla. 1998), the bankruptcy court ruled that the Eleventh Amendment was inapplicable in bankruptcy. The *Barrett* court concluded that bankruptcy cases were not suits within the meaning of the Eleventh Amendment, as no affirmative

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power interest in maintaining highway safety, it ruled that the Supremacy Clause barred a state from not giving full effect to a debtor's discharge in bankruptcy. In contrast, *Seminole Tribe* was interpreted in *In re Perez*, 220 B.R. 216 (Bankr. D. N.J. 1998) to mean that a bankruptcy court lacks the power to order the restoration of a debtor's driver's license (and even to prevent the debtor's incarceration by a municipal judge), because of a failure to pay pre-petition parking tickets, notwithstanding the fact that those debts were being paid under a confirmed chapter 13 plan. This recent *Perez* opinion demonstrates the confusion and threat to comity arising in recent Eleventh Amendment controversies in bankruptcy.

recovery was being sought by a debtor against a state. *Id.* at 807-808. Similarly, in *In re Psychiatric Hosps. of Florida, Inc.*, 216 B.R. 660 (M.D. Fla. 1998), the district court ruled that a motion by a debtor to determine its tax liability to a state was not a suit within the meaning of the Eleventh Amendment.

The clash between the Eleventh Amendment and the operation of the bankruptcy system is clearly illustrated by the decisions in the NVR Homes bankruptcy. In *In re NVR L.P.*, 206 B.R. 831 (Bankr. E.D. Va. 1997) the issue was whether the transfer tax exemption provided by section 1146(c) of the Bankruptcy Code was applicable to various transfers of property made by chapter 11 debtors pursuant to their jointly consolidated plan of reorganization. The *NVR* court ruled that *Seminole Tribe* barred it from even issuing a declaratory judgment with respect to whether the Bankruptcy Code exemption applied. It further warned of the dire consequences that the application of the *Seminole Tribe* doctrine would have in bankruptcy. The *NVR* court observed:

> [A] potentially irreconcilable conflict . . . may now exist between the Bankruptcy Clause and the Eleventh Amendment. Our national bankruptcy system, in which Congress intends debtors to retain the opportunity to reorganize and to obtain a fresh start, may be in grave danger if the states cannot be bound by orders issued by the federal courts under bankruptcy law.

Id. at 843 n.25. On appeal, the district court found a way to remedy this threat to the operation of the bankruptcy law. In *Clerk of Circuit Court v. NVR Homes, Inc.*, 222 B.R. 514, 520-521 (E.D. Va. 1998), the district court ruled that an action by a debtor seeking a declaration of whether a section 1146(c) tax exemption applied was not the type of suit which fell within

the scope of the Eleventh Amendment. Obviously, no declaratory judgment exception to the Eleventh Amendment exists. Such tortured results reflect the type of precedent being created by courts on all levels to protect the operation of the bankruptcy system.

After struggling with the inherent conflicts between the collective nature of a bankruptcy and the ability of a state to frustrate that process by the assertion of its enhanced Eleventh Amendment immunity, one bankruptcy judge concluded:

> Those who have devoted their professional lives and skills to federal law (and those whose jobs depend on the reorganizations and other activities, that the process contemplates) are anxious for instruction about what is Constitutionally permissible.

In re Zywiczynski, 210 B.R. 924, 933-934 (Bankr. W.D. N.Y. 1997). More than two years have passed since this Court described in dicta that Congress lacked the power to abrogate a state's Eleventh Amendment immunity in bankruptcy; yet, the lower courts still lack the necessary guidance in understanding the constitutional limits on a state's participation in the bankruptcy process. This uncertainly is breeding a confused set of precedents, which threaten to cloud the application of Eleventh Amendment doctrines in other areas of the law.

III.

THIS COURT SHOULD DECIDE WHETHER THE ELEVENTH AMENDMENT BARS THE BANKRUPTCY CODE'S ABROGATION OF STATE SOVEREIGN IMMUNITY IN MATTERS INVOLVING THE AUTOMATIC STAY.

Underlying the confusing Eleventh Amendment precedents arising in bankruptcy is the inability of a collective process to operate properly, where a critical participant, the states, can exclude themselves by asserting their Eleventh Amendment immunity.

The issue of whether Congress has the power to abrogate a state's Eleventh Amendment immunity was decided by the bankruptcy court and district court in *Straight*, and was fully briefed and argued before the Tenth Circuit below.[4] Thus, ripe for decision is the question of whether Congress has the right to abrogate a state's Eleventh Amendment immunity. *See United States v. Williams*, 504 U.S. 36, 41 (1992); *see also, Carlson v. Federal Bureau of Prisons*, 446 U.S. 14, 17 n.2 (1980) (Court may decide questions not raised below in the interest of judicial administration).

The presence of the issue of waiver in *Straight* will aid this Court in its consideration of the question of abrogation, because a careful consideration of Eleventh Amendment immunity in bankruptcy should encompass the alternative basis

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4. The bankruptcy and district courts ruled that the abrogation of sovereign immunity in section 106 of the Bankruptcy Code reflected an exercise of Congress's power under the Fourteenth Amendment, the position advocated by the Respondent. The Committee argued before the Tenth Circuit that the power to abrogate a state's sovereign immunity was inherent in the Bankruptcy Clause of the Constitution.

for jurisdiction provided by the doctrine of waiver. *Straight* provides a particularly useful vehicle for the analysis of this issue, because it also allows for consideration of the narrower question of whether the Eleventh Amendment bars the abrogation of state sovereignty in section 106(a) of the Bankruptcy Code with respect to the automatic stay.

Wyoming is seeking a reversal of the lower court's order for costs and attorneys' fees arising from the state's violation of the automatic stay, an injunction arising upon the filing of a petition in bankruptcy. The automatic stay is recognized as a fundamental protection provided by the Bankruptcy Code. 11 U.S.C. § 362(a). *See Midlantic Nat'l Bank v. New Jersey Dep't Envntl. Protection*, 474 U.S. 494, 503 (1986). It furthers the basic bankruptcy policy of providing an equal distribution of a debtor's assets among its creditors by enjoining all entities from taking any action to control a debtor's property or collect a pre-petition debt. *In re Parr Meadows Racing Assoc.*, 880 F.2d 1540, 1545 (2nd Cir. 1989), *cert. denied, sub nom., Suffolk County Treasurer v. Barr*, 493 U.S. 1058 (1990). Thus, when a state's sovereign immunity is successfully asserted to bar enforcement of the automatic stay, more than the rights of a single debtor is affected. The rights of all of a debtor's creditors are prejudiced. It is for this reason that the Tenth Circuit's analysis in *Straight* began with a description of the basic bankruptcy principle that all creditors in the same class are to be treated alike. *Straight*, 143 F.3d at 1389. It also is for this reason that no court apparently has ever denied a debtor the right to seek affirmative relief against a state in bankruptcy by the assertion of a compulsory counterclaim, the general rule of sovereign immunity outside of bankruptcy. *See* 3 *Moore's Federal Practice 3d* ¶ 13.50 [4] (1998).

Since its opinion in *Seminole Tribe*, this Court has shown a willingness to consider Eleventh Amendment questions

comparable to the issues presented by *Straight*. For example, in its recent decision in *Wisconsin Dept. of Corrections v. Schacht*, __ U.S. __, 118 S. Ct. 2047 (1998), this Court refused to accept a previously recognized broad application of Eleventh Amendment immunity requiring the dismissal of a case removed by a state to federal court after the claims against the state are dismissed on Eleventh Amendment grounds, notwithstanding the existence of nonbarred claims for relief against individual defendants. Justice Kennedy stated in his concurring opinion in *Schacht* that the Court should consider in some later case whether a state waived its Eleventh Amendment immunity by choosing to remove a case to federal court. *Id.* at 2055-2057. He recognized that such an action by a state was akin to the filing of a proof of claim in bankruptcy. *Id.* at 2056.

Even more significant was this Court's recognition of an in rem exception to Eleventh Amendment immunity in admiralty cases in *California v. Deep Sea Research, Inc.*, __ U.S. __, 118 S. Ct. 1464 (1998). Under the former Bankruptcy Act, a bankruptcy court's jurisdiction over the property of a debtor was used to define a bankruptcy court's jurisdiction to decide a controversy.

Several federal circuit courts of appeals appear to have implicitly recognized an in rem exception to Eleventh Amendment immunity in bankruptcy. For example, in *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997), the Fourth Circuit found that a state was bound by the transfer tax exemption provided in an order confirming a chapter 11 plan. The *Antonelli* court responded to an Eleventh Amendment challenge by claiming that the power to issue the confirmation order was derived from the bankruptcy court's jurisdiction over the debtor and its estate, "not from jurisdiction over the state." *Id.* at 787. The distinctive position a bankruptcy court holds because of its jurisdiction over the property of a

debtor also was recognized by the Fifth Circuit Court of Appeals in *Walker*, 142 F.3d at 822.

Neither of these circuit courts of appeals would explicitly recognize the existence of an in rem exception to Eleventh Amendment immunity in bankruptcy, given this Court's broad statement of principle in *Seminole Tribe* and its prior rulings in *United States v. Nordic Village Inc.*, 503 U.S. 30, 39 (1992) (no in rem exception exists to sovereign immunity bar against monetary recovery), and *Fiske*, 290 U.S. at 28 (no in rem exception to Eleventh Amendment immunity exists). *See also In re Fernandez*, 123 F.3d 241, 243-245 (5th Cir. 1997) (*Seminole Tribe* bars Congress from abrogating state sovereign immunity in the Bankruptcy Code); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 243-244 (3rd Cir. 1998) (*Seminole Tribe* bars Congress from abrogating state sovereign immunity in the Bankruptcy Code). Thus, by addressing the Eleventh Amendment abrogation issue in *Straight*, this Court can provide direction to the lower courts in addressing not only the automatic stay, but also the issuance of other orders whose collective nature is the particular province of bankruptcy, such as orders confirming a chapter 11 plan or discharging a debtor's liabilities. It is apparent that some type of abrogation of sovereign immunity is required; otherwise, such essential bankruptcy court orders would be ineffective against a state which failed to file a proof of claim. The courts below recognize this basic problem, but only this Court has the authority to define the constitutional basis for imposing such a limitation on the Eleventh Amendment rights of a state.

In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028 (1997), this Court recognized that the resolution of Eleventh Amendment controversies may involve a balancing of interests. *Id.* at 2038. Such an approach is consistent with this Court's past recognition of "the delicate adjustments required by our federalism." *Toucey v. New York Life Insurance*

Co., 314 U.S. 118, 141 (1941). After *Seminole Tribe*, only this Court has the authority to give direction to the lower courts in striking the delicate balance which must be established in resolving the inherent conflict between a state's Eleventh Amendment rights and the federal bankruptcy power.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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